THE INDIAN DECISIONS, NEW SERIES.

MADRAS, Vol. VII.

# THE

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# JUDGES OF THE HIGH COURT OF MADRAS DURING 1897-1898.

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**Puisne Judges:**

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# THE
# INDIAN DECISIONS
## NEW SERIES.
## MADRAS—VOL. VII.

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## I.L.R., 20 MADRAS.

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**20 M. 1=1 Weir 140=1 Weir 797.**

1896 SEP. 11.

APPELLATE CRIMINAL.

APPELLATE CRIMINAL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

QUEEN-EMPRESS *v.* SUBRAMANIAN AND OTHERS.*
[11th September, 1896.]

**20 M. 1= 1 Weir 140= 1 Weir 797.**

*Penal Code, Section* 188—*Local Boards Act—Act V of* 1884 (*Madras*), *Sections* 98, 100—*Disobedience to notice.*

The President of a Local Board, acting under Act V of 1884, issued a notice calling upon a person to remove certain encroachments on a public road within ten days:

*Held*, that such a notice was not an order within the meaning of Section 188, Indian Penal Code, and a person neglecting to obey it could not be convicted under that section.

[**F.**, 1 Bom. L.R. 166; **R.**, 12 Cr. L.J. 63=9 Ind. Cas. 329=(1911) 1 M.W.N. 78.]

CASES referred for the orders of the High Court under Section 438 of the Code of Criminal Procedure by J. Hewetson, Acting District Magistrate of Malabar.

The facts of this case appear sufficiently from the letter of reference, which was as follows:—

"The accused in each of the cases has been sentenced to a fine of "Rs. 10, or in default to one week's simple imprisonment for disobedience "to an order of the Taulk Board President of Malapuram to remove "encroachments on the public road, an offence punishable under Section "188, Indian Penal Code.

"I am of opinion that failure to remove an obstruction in obedience "to a notice under the Local Boards Act is not punishable [2] under "Section 188, Indian Penal Code. The procedure to be observed is "prescribed by Section 100 of the Local Boards Act, which says that the "president is to have the obstruction removed and recover the costs from "the defaulter.

---

* Criminal Revision Cases Nos. 288 to 290 of 1896.

1896 SEP. 11. — APPELLATE CRIMINAL. — 20 M. 1= 1 Weir 140= 1 Weir 797.

"In criminal revision case No. 568 of 1885 (1) it was laid down "that a lawful order for the removal of an obstruction from a public "way can only be issued in the mode and by the officer named in "Chapter X of the Code of Criminal Procedure. The president of a "taluk board is not one of the officers named in Section 133, Criminal "Procedure Code.

"I have the honour, therefore, to request that the convictions in "these cases may be set aside and the fines ordered to be refunded."

The material portions of Sections 98 and 100 of the Local Boards Act necessary for the purposes of this report are as follows :—

"Section 98. (1) No wall, fence or other obstruction or encroachment "shall be erected on any public street without the written permission of "the president of the taluk board or some person duly authorized by him "in that behalf; nor shall any building be erected without such permission "over any sewer or drain or any part of a sewer or drain, or upon any "ground which has been covered, raised or levelled wholly or in part by "street-sweepings or other rubbish.

"(2) If any person erects such obstruction or building without such "permission, or, where such permission shall have been granted in a "manner contrary to or inconsistent with the terms of such permission, "the president of the taluk board, or other person duly authorized as "aforesaid, may by notice in writing require the person who shall have "erected the obstruction or building to remove the same within a time to "be specified in such notice.

"Section 100. (1) If any person to whom a notice shall have been "given under the provisions of this Act requiring him to execute any "work omits to comply with such notice, the president of the taluk board, "or any person authorized by him in that behalf, may cause such work to "be executed.

"(2) The expenses incurred in the execution of such work shall "be paid by the person to whom the notice shall have been **[3]** given, "and shall be recoverable in the manner hereinbefore provided for the "recovery of the arrears of the tax on houses."

The Acting Public Prosecutor (*Mr. N. Subramaniam*), for the Crown.

The accused persons were not represented.

## ORDER.

Reading Sections 98 and 100 of the Local Boards Act (V of 1884) together, it is clear that the notice prescribed by the former section is a mere preliminary to the action to be taken by the president himself and not by the party under the latter section. The notice in question is, therefore, merely a notice and not an order of the kind contemplated in Section 188 of the Penal Code.

We accordingly agree with the District Magistrate that the convictions were wrong and set them aside and direct that the fines, if paid, be refunded.

(1) Weir, 3rd Ed. 77.

20 M. 3 = 2 Weir 638.

1896 SEP. 21.

APPELLATE CRIMINAL.

20 M. 3 = Weir 638.

## APPELLATE CRIMINAL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

ALLAPICHAI RAVUTHAR v. MOHIDIN BIBI.*
[17th and 21st September, 1896.]

*Criminal Procedure Code, Section 488—Maintenance—Sentence of imprisonment on default.*

The imprisonment provided by Section 488, Criminal Procedure Code, in default of payment of maintenance awarded is not limited to one month. The maximum imprisonment that can be imposed is one month for each month's arrear, and if there is a balance representing the arrears for a portion of a month, a further term of a month's imprisonment may be imposed for such arrear.

[**F.**, 25 C. 291 (293); **R.**, 4 Ind. Cas. 900 = U.B.R. (1907—1909), Vol. II, Cr. Pro. Code 21; 5 O.C. 316 (317); **D.**, 4 Ind. Cas. 899 = U.B.R. (1907—1909), Vol. III, Cr. Pro. Code 19.]

CASE referred by R. D. Broadfoot, Acting Sessions Judge of Trichinopoly, for the orders of the High Court, under Section 438 of the Code of Criminal Procedure.

The case was stated as follows :—

"Mohidin Bibi, on behalf of her minor daughters, put in a petition "to the Head Assistant Magistrate against her husband [4] Allapichai "Ravuthar for realization of Rs. 83-14-5, being the accumulated arrears "of maintenance for 55 months and 28 days.

"After full enquiry the Head Assistant Magistrate was not satisfied "that the said Allapichai is unable to pay the said arrears and ordered "him either to pay Rs. 83-14-5, or to undergo simple imprisonment for a "term of six months.

"I am of opinion that the said order of imprisonment for six months "is probably illegal (vide *Queen-Empress* v. *Narain* (1),) though in *Biyacha* "v. *Mohidin Kutti* (2) the period of imprisonment for default of payment "of accumulated arrears was four and-a-half months, and the High Court "did not comment on this; still the case was not argued on that point, "and I doubt if their Lordships meant to approve of more than one "month.

"Any way, I submit that, in my opinion, the sentence of six months "is excessive. The man has now served two months and three days.

"Under these circumstances I have the honour to request the "Honourable Judges of the High Court to modify the said order of the "Head Assistant Magistrate: the prisoner has this day been released on "bail."

The parties were not represented.

## ORDER.

The question before us is whether the maximum sentence which may be imposed on any one occasion under Section 488 of the Code of Criminal Procedure is one month, or whether a longer term may be imposed at the rate of one month's imprisonment for each month's arrear remaining unsatisfied. In High Court Proceedings, dated 19th April 1871 (3), this Court remarked that only one month's imprisonment could be awarded,

* Criminal Revision Case No. 170 of 1896.

(1) 9 A. 240. (2) 8 M. 70. (3) 6 M.H.C.R. App. 22.

1896 SEP. 21. — APPELLATE CRIMINAL. — 20 M. 3 = 2 Weir 638.

but this observation was made with reference to the terms of Section 316 of the Criminal Procedure Code then in force (Act XXV of 1861) which runs as follows:—"The Magistrate may, for every breach of the order by "warrant, direct the amount due to be levied in the manner provided for "levying fines; or may order such person to be imprisoned with or with-"out hard labour for any term not exceeding one month."

The words of Section 488 of the present Code are very different. They are:—"the Magistrate may, for every breach of the order, issue a "warrant for levying the amount due in manner herein [5] before provided "for levying fines, and may sentence such person for the whole or any part "of each month's allowance remaining unpaid after the execution of the "warrant, to imprisonment for a term which may extend to one month." The change is significant, and the words "for the whole or any part of "each month's allowance" are unmeaning, if, in any case, the maximum sentence can only be one month's imprisonment. In the interpretation put upon the section by the Allahabad High Court (*Queen-Empress* v. *Narain* (1)) we are therefore unable to agree. The difficulty suggested by Edge, C.J., in determining to which month out of several a sum levied should be appropriated does not seem to be important. The procedure contemplated by the Code appears to be to deduct the sum levied from the sum due, and then to ascertain how many months' arrears the balance represents. The maximum imprisonment that can be imposed will then be one month for each month's arrears, and if there is a balance representing the arrears for a portion of a month a further term of a month's imprisonment may be imposed for such arrear. Our view is in accordance with the construction incidentally put upon the section by this Court in the *Biyacha* v. *Mohidin Kutti* (2).

In the peculiar circumstances of this case we should not have been prepared to say the sentence was altogether excessive, but as the Sessions Judge has already released the prisoner on bail before the expiration of his sentence, we think it inexpedient that he should be again committed to jail. His bail may, therefore, now be discharged.

---

**20 M. 6.**

## [6] APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

SRINIVASARAGAVA AYYANGAR AND ANOTHER (*Plaintiffs*), *Appellants* v. MUTTUSAMI PADAYACHI AND ANOTHER (*Defendants*), *Respondents*.* [7th October, 1896.]

*Limitation—Adverse possession—Rent Recovery Act (Madras)—Act VIII of* 1865*—Omission by inamdar to obtain registration of title under Regulation XXVI of* 1802 *—Effect of.*

An inamdar had not obtained registration of his title under the registered landlord and could not therefore sue to enforce acceptance of pattas and had not collected rent from the tenants for more than twelve years:

*Held*, that the tenants had not by reason of these facts acquired rights against the inamdar by adverse possession.

---

* Second Appeal No. 807 of 1895.

(1) 9 A. 240. (2) 8 M. 70.

1896 Oct. 7. — Appellate Civil. — 20 M. 6.

Second appeal against the decree of E. J. Sewell, Acting District Judge of Tanjore, in appeal suit No. 333 of 1894, reversing the decision of R. B. Clegg, Acting Sub-Collector of Tanjore, in summary suit No. 132 of 1893.

The facts of this case set forth in the judgment of the Sub-Collector were as follows:—

"This is a suit under Act VIII of 1865 to enforce acceptance of patta "for fasli 1302. The patta was tendered to the defendants on the 23rd "June 1893, but they refused it. There is no question of the tender of "patta.

"The issues in this suit are:—(i) whether the defendants are tenants "of the plaintiffs and are bound to accept a patta; (ii) whether the terms "of the patta tendered are correct.

"On the first issue the plaintiffs allege that they are registered inam-"dars of the 'Nadusettu' of Tirupatorai. They produce Exhibit A, a "sale-deed, dated 19th January 1878, under which they derive their title "as inamdars of this 'Settu' from the former inamdar Sankara Peshwai. "Exhibit D is a copy of the revenue register, ordering the patta for the "lands purchased from [7] Sankara Row Peshwai to be entered in their "names on February 1884.

"The defendants' contention on this issue is that they have never "paid any rents to the plaintiffs for over twelve years; that they have been "in possession of their lands with all rights of ownership for over twelve "years, and that, therefore, the plaintiffs' claim is barred by limitation.

"The defendants rely on a judgment in A. S. No. 419 of 1880 of the "District Court, Tanjore. This was an appeal against the decree of the "Head Assistant Collector in summary suit No. 84 of 1880 in which "Sankara Row Peshwai was first plaintiff and the present plaintiffs "second and third, respectively. The District Judge then held that as the "present plaintiffs had not then been registered as inamdars in the "Collector's register, they were not entitled to tender patta though he "ordered defendants to accept patta from Sankara Row Peshwai. The "defect of revenue registry has now been overcome, and the question is "whether the defendants have acquired a title to the melvaram rights over "the land by adverse possession for more than twelve years."

The Sub-Collector held that the defendants were bound to accept the patta tendered subject to a modification not now material.

The District Judge reversed this decree and dismissed the suit with costs with the following remarks:—

"The right of the plaintiffs to take action as the landlords of the "defendants was explicitly denied in 1880 and the matter was decided "against plaintiffs. If the relation of landlord and tenant had ever exist-"ed between them, the tenancy was then put an end to. The defendants "have held possession ever since, although the bar stated in the decision "to the claim of the plaintiffs (want of registry of the inam in their "name) was removed in 1884. The present suit was not brought until "1893. I am of opinion that the plaintiffs' suit as landlords is barred, "and that the defendants are not their tenants."

The plaintiffs preferred this second appeal.

Mr. *Krishnan*, for appellants.

No one appeared for the respondents.

## JUDGMENT.

No one appears to oppose the appeal. We find ourselves unable to support the decree of the District Judge.

1896 OCT. 7. — APPELLATE CIVIL. — 20 M. 6.

The decree in appeal suit No. 419 of 1880 (Exhibit I) did not decide that the then defendants' were in adverse possession of [8] the lands as against the then landlord. It merely decided that the present plaintiffs (then second and third plaintiffs) had not then obtained registration of their title under the registered landlord, and that they could not maintain a suit to enforce acceptance of patta until such registration had been made. The registration was made in 1884 and by that registration the plaintiffs for the first time obtained a complete title on which to enforce acceptance of pattas. There is no evidence that the possession by the tenants was at any time hostile to the plaintiffs or their vendor. The mere omission to collect rent does not make the tenancy hostile.

We must reverse the decree of the District Judge and restore that of the Sub-Collector. The plaintiffs must have their costs throughout.

---

**20 M. 8.**

## APPELLATE CRIMINAL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

---

QUEEN-EMPRESS *v.* ABDUL KADAR SHERIFF SAHEB.*
[14th September, 1896.]

*Criminal Procedure Code, Sections* 195, 433—*Abetment of an offence, Section* 109, *Penal Code—Sanction to prosecute unnecessary.*

Though sanction to prosecute is necessary in cases falling under the sections of the Penal Code set forth in Section 195, Criminal Procedure Code, no such sanction is required previous to the prosecution of a person charged with the abetment of such offences.

[R., 32 A. 74 (76) =6 A.L.J. 983=10 Cr. L. J. 497=4 Ind. Cas. 105; 32 M. 3=9 Cr. L. J. 130=1 Ind. Cas. 36=5 M.L.T. 16.]

CASE stated for the opinion of the High Court by W. E. Clarke, Acting Chief Presidency Magistrate, in calendar case No. 18351.

The case was stated as follows:—

"One Beejan Bi accused one Hyath Bi of criminal breach of trust in "calendar case No. 3732 of 1896 on the file of this Court. Accused was "discharged under Section 253, Criminal Procedure Code. Hyath Bi "subsequently in calendar case No. 5988 of 1896 applied for sanction to "prosecute Beejan Bi and one Abdul Kadar Sheriff who was alleged to "have abetted Beejan Bi to [9] bring a false charge against Hyath Bi. "This Court, after inquiry, sanctioned the prosecution of Beejan Bi for "bringing a false charge, but, thinking that a sanction was unnecessary to "support an action for abetment of an offence under Section 211, Penal "Code, declined to grant sanction to prosecute the alleged abetter. Subse-"quently Beejan Bi complained of Abdul Kadar Sheriff having abetted an "offence under Section 211, Penal Code, and this Court issued a sum-"mons against the said Abdul Kadar Sheriff. It is now argued no pro-"ceedings will lie against Abdul Kadar Sheriff for abetment of an offence "under Section 211, Indian Penal Code, without sanction. I have now the "honour to solicit an opinion as to whether abetment being a substantive "offence punishable under sections of the Penal Code other than those "mentioned in Section 195 Clause (*b*) of the Criminal Procedure Code, sanc-"tion is necessary before a Court can take cognizance of such an offence as

* Criminal Referred Case No. 1 of 1896.

"abetment of an offence under Section 211, Indian Penal Code. I make "this reference, as I am asked to do so, and the point seems one of importance regarding which a definite ruling would be of advantage to "the public."

The Crown Prosecutor (Mr. *R. F. Grant*), for the Crown.
*Srinivasaragava Chariar*, for complainant.
Mr. *Ramasami Raju*, for the accused.

## OPINION.

The abetment of an offence is an offence of itself and is punishable under separate sections of its own. None of those sections is mentioned in Clause (*b*) of Section 195 of the Code of Criminal Procedure, and therefore sanction need not be obtained in respect to them.

The fact that the Legislature has not included in Section 195 the sections of the Penal Code relating to abetment is probably due to the circumstance that in the generality of cases the facts connected with the abetment are not likely to come before the Court.

The costs of this reference must be paid by the accused at whose instance it was made.

---

**20 M. 10.**

## [10] APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.*

ABBUBAKER SAHIB (*Auction-Purchaser*), *Appellant v.*
MOHIDIN SAHEB (*Judgment-debtor*), *Respondent.**
[17th October, 1896.]

*Civil Procedure Code, Sections* 224, 311—*Application to set aside sale—Effect of fraud—Auction-purchaser no party to fraud—Absence of certificate under Section* 224—*Mere irregularity.*

A judgment-debtor cannot have a Court sale set aside on the ground of fraud in the absence of proof that the auction-purchaser was a party to the fraud and that the fraud came to the judgment-debtor's knowledge subsequent to the confirmation of the sale.

The omission to transmit to the Court executing the decree the certificate required by Section 224, Civil Procedure Code, is a mere irregularity which would not vitiate the sale.

**[Diss., 6 C.L.J. 111 (118).]**

PETITION under Section 622 of the Code of Civil Procedure, praying the High Court to revise the order of the District Judge of South Malabar in civil miscellaneous appeal No. 26 of 1895, confirming the order of U. Achutan Nayar, Principal District Munsif of Calicut, in civil miscellaneous petition No. 2298 of 1894.

This was an application by the judgment-debtor to set aside a sale of immoveable property in execution of decree No. 408 of 1887 on the file of the Cannanore Munsif's Court transferred to the Court of the Principal District Munsif of Calicut for execution. The sale was effected on 6th June 1891 and was confirmed on 6th August 1891.

The grounds alleged for setting aside the sale were: first, that no notice of execution was served upon petitioner; secondly, that the decree-holder was guilty of fraud in preventing service of notice by false

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* Civil Revision Petition No. 474 of 1895.

1896 Oct. 17. — Appellate Civil. — 20 M. 10.

representation; and, thirdly, that the transfer of execution to this Court was not accompanied by the certificate required by Section 224 of the Code of Civil Procedure.

The District Munsif found that notice was not served on the judgment-debtor, secondly, that the service of notice upon the [11] defendant was prevented by the fraudulent representation of the decree-holder, and, thirdly, that the absence of the certificate required by Section 224 would not vitiate the sale and he set aside the sale as prayed. On appeal the District Judge confirmed the order of the District Munsif and his order was as follows:—

"I am unable to agree with the Munsif that a notice to the judgment-"debtor was required in this case, for I consider that the order passed "under Section 312, Code of Civil Procedure, confirming the sale was "distinctly an order passed against the person against whom execution "was applied for. Indeed such an order is expressly referred to in the "last clause of the section itself as an order made against a party.

"But I can uphold the order of the Munsif on another ground, one "that he would not allow, namely, the third objection taken by the "judgment-debtors that the decree was not executable by the Munsif in "the absence of the certificate required by Section 224, Code of Civil "Procedure. It must be taken that no such certificate ever existed "because (i) it is not found in the record, and (ii) if it had existed, the "Court would never have issued execution for the whole amount of the "decree when a substantial portion of it over Rs. 1,000, about one-third "of the amount, had already been realized. Until the certificate and "copies required by Section 224, Code of Civil Procedure, are 'filed' (*vide* "Sections 225 and 226) there is no material for the Court to act upon, in "other words, it has no jurisdiction to execute. The execution proceed-"ings in this case were, therefore, null and void *ab initio*, and on this "ground I confirm the Munsif's order setting aside the sale and dismiss "the appeal with costs."

The auction-purchaser appealed.

*Narayana Rau*, for appellant.

*Sankaran Nayar*, for respondent.

## ORDER.

The petitioner, who was appellant in the District Court, seeks to have the order of the District Court set aside on the ground that the Judge exercised a jurisdiction which he did not possess. That order confirmed the order of the District Munsif, which proceeded on the ground of fraud practised upon the judgment-debtor.

It appears that the sale had been confirmed before the application to set it aside was made. That being so we are of opinion that the ground assigned by the Judge for confirming the District [12] Munsif's order is not a valid one, because the omission to send the certificate required by Section 224 could not affect the jurisdiction of the Court to sell. It would be a mere irregularity not entitling any party to have the sale set aside after confirmation. The only ground, as it appears to us, on which the order of the District Munsif could be supported would be that the sale had been brought about by fraud to which the purchaser was a party. Fraud as between the decree-holder and the judgment-debtor only could not affect the purchaser.

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The District Munsif does not find distinctly that the purchaser was party to the fraud, and he also omits to say whether the fraud was discovered after the confirmation of the sale.

We are of opinion that, unless there was evidence that the purchaser was party to the fraud, and that the judgment-debtor discovered it subsequently to the confirmation of the sale, the District Munsif would have had no jurisdiction to set it aside. In the absence of such evidence the case would be a proper one for interference under Section 622. We must ask the Principal District Munsif of Calicut to return a finding on the above question within one month from the date of the receipt of this order. Seven days will be allowed for filing objections after the finding has been posted up in this Court.

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**20 M. 12 = 1 Weir 820.**

## APPELLATE CRIMINAL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

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QUEEN-EMPRESS v. PAUL AND OTHERS.* [30th September, 1896.]

*Indian Christian Marriage Act—Act XV of* 1872, *Section* 68—*Solemnize.*

In Indian Christian Marriage Act, Section 68, the word "solemnize" is equivalent to the words "conduct, celebrate or perform." Therefore any unauthorised person not being one of the persons being married, who takes part in performing a marriage, that is, in doing any act supposed to be material to constitute the marriage is liable to be convicted under that section; and a charge of abetment is sustainable against the persons being married.

[13] APPEAL under Section 417 of the Code of Criminal Procedure against the judgment of acquittal passed by E. J. Sewell, Sessions Judge of North Arcot, in sessions case No. 45 of 1895.

The facts of this case were stated in the judgment of the Sessions Judge as follows:—

"The first defendant Paul is a Native Christian. The second defendant Bakkaiyan is a Hindu by religion. The third defendant Simeon is stated in the charge to be a Native Christian. Paul and Bakkaiyan are charged under Section 68 of the Indian Christian Marriage Act with solemnizing or professing to solemnize a marriage between third defendant, a Christian, and a woman professing Hinduism in the absence of a Marriage Registrar, they not being authorized under the Indian Christian Marriage Act to solemnize marriages. The third defendant, the man married, is charged under the same section with abetting the offence.

"The first defendant's defence is that he was not even present at third defendant's marriage and did not solemnize it. The second defendant's defence is that he took no part in the ceremony but only acted as cook.

"The third defendant's defence is that he had before the date of the marriage—2nd September 1895—ceased to profess the Christian religion. He also denied that the marriage was solemnized by first and second defendants so that, of course, he denies abetting them.

"It appears from the evidence for the prosecution that the Reverend L. R. Scudder, a Missionary of the American Reformed Church in North Arcot, having learnt that some of the Native Christians under his care

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* Criminal Appeal No. 255 of 1896.

1896 Sep. 30. — Appellate Criminal. — 20 M. 12 = 1 Weir 820.

"in the village of Bassoor were contemplating marriage according to "non-Christian rites, and without observing the provisions of the Indian "Christian Marriage Act went to Bassoor on 1st September and remons- "trated with the elders of the church—of whom first defendant is one "—and pointed out to them that if they carried out their intention they "would expose themselves to legal penalties. Dr. Scudder and other "witnesses called, state that the third defendant Simeon *alias* Vilvana- "than attended the church, listened to the proceedings and said nothing "whatever in reply to these remonstrances.

"The native pastor of the church, the catechist in immediate charge, "and other attendants at the services and members of the [14] church "depose that Simeon had up to 1st September been attending the weekly "worship and had taken part in the Lord's Supper and that he continued "to do so after 1st September up to 15th September. The registers of "the church and of attendance at the services are produced and corroborate "these statements."

The Sessions Judge found that the defendant continued up to the date of his marriage to profess the Christian religion, but, acquitted him on the charge of abetment, and also acquitted defendants Nos. 1 and 2. He gave judgment as follows as regards the construction of the Act:—

"It appears to me that the word solemnization as used in the Act is "different to the mere conducting of the marriage and that it involves the "performance by some person possessing or claiming authority to do so "of religious rites appropriate to the occasion. There are two cases in "which a marriage without religious rites is permissible, *viz.*, in the case "of a marriage in the presence of a Marriage Registrar and in the case of "marriage between Native Christians certified by a person licensed under "the Act to certify marriages of Native Christians; the second case is "hardly an exception since by Section 60, Clause (3), a solemn appeal to "the Deity is made a necessary part of the ceremonial. But the marriage "in this case is not spoken of as being solemnized by the person licensed "to give a certificate, but as solemnized by the parties in his presence (see "Sections 61 and 62).

"So also in the case of marriages before a Marriage Registrar, the "parties to the marriage are left free to solemnize the marriage between "them 'according to such form and ceremony as they think fit to adopt' "(Section 51) and such a marriage is spoken of in Section 51 as solemnized "'in the presence of some Marriage Registrar' and in Section 53, as "solemnized before a Marriage Registrar. In all other cases, the Minister "of Religion is spoken of as solemnizing the marriage.

"It is true that in Section 5 and in the heading to Part V the phrase "is used 'marriages solemnized by or in the presence of a 'Marriage "Registrar.'

"But it is doubtful whether this means that there are two different "kinds of marriage, one solemnized by the Marriage Registrar and the "other solemnized in his presence. There is in Part V only one procedure "laid down and that is, in Part V itself [15] spoken of as solemnized by "the parties in the presence of the Registrar.

"I think, therefore, that it is most consistent with the whole tenor "of the Act to confine the description of a person solemnizing the marriage "to some person having or claiming authority recognised by the parties "to conduct the religious or ceremonial rites prescribed by his ecclesiasti- "cal authority (Section 5, Clauses 1 and 2) or chosen by himself (Part III, "Section 25).

1896 SEP. — APPELLATE CRIMINAL. — 20 M. 12= 1 Weir 820.

"In the cases where there is no such person, the marriage is "solemnized between the parties but not solemnized by any one.

"If there be an exception to this, it is the case of a Marriage Registrar "and it exists because he is authorized to require a 'solemn' declaration "from the parties (Section 51).

"If in the case now under consideration the recognised priest of "Pariahs, a Valluvan, had conducted the ceremonial usual in such cases, "he would, no doubt, come under the description of a person solemnizing "or professing to solemnize a marriage given in Section 68.

"But in the absence of any such person, I do not think that any "person taking a part, even a leading part, in the ceremonies adopted, but "neither claiming nor having any authority recognised by the parties, to "do so, can be said to have solemnized the marriage.

"In such a case, I hold the marriage to have been, in the language "adopted in the Act, solemnized between the parties, but not solemnized "by any one.

'In the only reported case, the person held liable was a 'Hindu "'priest' (see Weir, 3rd edition, page 565 (1)).

"I find therefore that the acts attributed to the first and second "defendants did not amount to a solemnization of the marriage by them "so that they are not liable under Section 68.

"It is therefore needless to go at length into the evidence whether "they were present or not. I think that there is room for reasonable "doubt whether first defendant was present."

The Acting Public Prosecutor (Mr. *N. Subramaniam*), for the Crown.

*Sundara Ayyar*, for the accused.

## JUDGMENT.

**[16]** We cannot accept the Judge's interpretation that the word "solemnize" as used in the Act applies to only such marriage ceremonies as are performed by some person possessing or claiming authority to perform them by virtue of ecclesiastical authority. The Judge's view is quite inconsistent with the provisions of the Act which use the word "solemnization" with reference to marriages before the Marriage Registrar who is an official possessing no ecclesiastical character, and before whom no ceremonies are necessary. A marriage before him is a mere civil marriage and yet the word in question is applied to such a marriage equally with marriages accompanied by religious ceremonial. We, therefore, take the meaning of the word to be equivalent to conduct, celebrate or perform. In this view any person, not being the persons being married, who actually took part in performing this marriage, that is, in doing any act that was supposed to be material to constitute the marriage was clearly guilty under Section 68 of Act XV of 1872 as parties either solemnizing a marriage or professing to do so.

In the case of the persons being married, we consider a charge of abetment is sustainable as without their presence and aid the marriage could not possibly take place. On this ground the acquittal by the Judge of the third accused was wrong. For these reasons we set aside the acquittal of all the accused and direct that they be re-tried with reference to the merits of the case.

Ordered accordingly.

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(1) S.C. 6 M.H.C.R. App. XX=1 Weir 801.

[REPORTER'S NOTE.—Compare *Queen-Empress* v. *Yohan and others*, 17 M. 391.]

1896 SEP. 29.

APPELLATE CRIMINAL.

20 M. 16 = 1 Weir 793.

20 M. 16 = 1 Weir 793.

## APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

QUEEN-EMPRESS *v.* KUTTI ALI.* [29th September 1896.]

*Local Boards Act—Act V of* 1884 (*Madras*), *Section* 87, *Clause* 3—*Government stores —Equipages.*

Stores and carts belonging to the Government jails come within the words [17] Government Stores and Equipages in Clause 3, Section 87, Act V of 1884, and are free from tolls under that Act.

PETITION under Sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the finding of M. Swaminatha Ayyar, Sub-Divisional First-class Magistrate of Calicut Division, in Calender case No. 12 of 1896, wherein the accused was discharged, under Section 253, Criminal Procedure Code, of offences, under Section 417, Indian Penal Code, and Section 165 of Act V of 1884 (Madras).

The facts are as follows :—

"Sheik Moideen, a warder of the Central Jail, Cannanore, laid a "complaint before the Town Second-class Magistrate, Cannanore, charging "the defendant, Kutti Ali, the Edakkad Toll-keeper, with illegal collection "of the toll from him under Section 60, Act V of 1884.

"The evidence shows that articles manufactured at the jail are sent "by the jail carts to Public Departments as well as to private parties, "and a pass is given by the Superintendent, Central Jail, claiming exemp- "tion from payment of tolls. The defendant refused to accept the passes "at the Local Fund Toll-gate at Edakkad and stated that the *hukum-* "*namah* given to him by the President, District Board, did not contain "any clause to allow the exemption claimed."

Section 87 of Act V of 1884 runs as follows :—

"If the District Board notify under Section 60 that tolls on carriages, "carts and animals passing along any road within the district shall be "levied at the rates specified in the notification, such tolls shall be levied "as provided in Sections 88 to 92.

"The District Board may compound with any person for a sum to "be paid annually or half-yearly in lieu of all such tolls either generally "in respect of all roads in the district or specially in respect of any parti- "cular road, and may issue licenses to any such person in respect of his "carriages, carts and animals ;

"Provided always that such composition shall include all the "carriages, carts and animals possessed by the person compounding.

"No tolls shall be paid for the passage of troops on their march, or "of military and Government stores and equipages, or of military and "police officers on duty, or of any person or [18] property in their custody, "or for the passage of vehicles and animals licensed by the District Board "while such licenses are in force."

The exemption is claimed on two grounds, namely :—

(*a*) That the articles conveyed come within the category of 'Government Stores,' and

(*b*) That the jail carts come within the meaning of the term 'Equipages.'

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* Criminal Revision Case No. 340 of 1896.

1896 SEP. 29. — APPELLATE CRIMINAL. — 20 M. 16 = 1 Weir 793.

The Magistrate acquitted the accused being of opinion that the articles conveyed were not Government Stores and that the jail carts are not included in the term 'Equipages.'

The Acting Public Prosecutor (Mr. *N. Subramaniam*), for the Crown.

Mr. *Krishnan*, for the accused.

ORDER.—

We are of opinion that stores and carts belonging to the Government jails come within the words 'Government Stores and Equipages' in Section 87 of Act V of 1884, and are free from tolls under that Act.

The First-class Magistrate was, therefore, wrong in discharging the accused on the grounds assigned by him in his judgment.

We, therefore, direct the said Magistrate to restore the case to his file and proceed to dispose of it in accordance with law. The Acting Government Pleader informs us that the object of Government in moving the Court to interfere in this case is merely to ascertain the law. We are of opinion that, if a conviction is obtained against the accused, a purely nominal fine will suffice, as the sense in which the word 'Equipages' is used in the Act is not free from doubt and the construction placed upon it by the toll-keeper was not an unnatural one or, in our opinion, so far as the records show dishonest.

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**20 M. 19.**

## [19] APPELLATE CIVIL.

*Before Sir Arthur J.H. Collins, Kt., Chief Justice and Mr. Justice Benson.*

CHINNA KRISHNA REDDI (*Plaintiff*), *Appellant v.* DORASAMI REDDI AND ANOTHER (*Defendants*), *Respondents.**

[7th September, 1886.]

*Specific performance of contract—Sale-deed fraudulently suppressed by defendant before registration—Cause of action.*

Where the defendant agreed to sell certain land to the plaintiff and executed a sale-deed in favour of the plaintiff to that effect, but subsequently obtained possession of it before registration and fraudulently suppressed it :

*Held*, that the plaintiff was entitled to enforce specific performance of the contract by the execution and registration of a fresh document.

[**Rel.**, 12 C.L.J. 464 = 8 Ind. Cas. 794 (795) ; 7 Ind. Cas. 408 (409) = 7 A.L.J. 887 (889); **D.**, 16 Ind. Cas. 433 (434) = 12 M.L T. 301.]

SECOND appeal against the decree of S. Russell, District Judge of Chingleput, in appeal suit No. 193 of 1893, confirming the decree of K. Ramachandra Ayyar, District Munsif of Chingleput, in original suit No. 142 of 1891.

The facts of this case were as follows :—

The suit is for specific performance of a contract of sale.

Plaintiff alleged that in March 1890 the first defendant agreed to sell to him certain lands and a document was actually drawn up and executed by first defendant. Plaintiff says the consideration duly passed from him, and it was so recited in the document.

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* Second Appeal No. 687 of 1895.

1886 SEP. 7. — APPELLATE CIVIL. — 20 M. 19.

Defendant admitted the execution of a sale-deed, but says the transaction fell through as plaintiff failed to pay the consideration.

There was a subsequent sale by 1st defendant to second defendant, but this was held to be a nominal transaction.

The District Munsif dismissed the suit and his decree was confirmed on appeal by the District Judge, who however found that the plaintiff has paid full consideration and that the defendant had in fact executed the document which was delivered to plaintiff, but subsequently redelivered to the first defendant who has retained possession, but dismissed the suit on the authority of *Venkatasami* v. *Kristayya* (1).

[20] The plaintiff appealed.

*Pattabhirama Ayyar* and *Srirangachariar*, for appellant.
*Masilamani Pillai*, for respondent.

## JUDGMENT.

The case relied on by the District Judge (*Venkatasami* v. *Kristayya* (1)) is not in point. In that case the plaintiff was in possession of the document, and it was solely by reason of his own negligence that he was unable to register the document; and it was for this reason that the High Court in that case decided that no suit would lie to compel the defendant to execute a fresh document.

The present case stands on a totally different footing. In it the first defendant fraudulently made away with the document after its execution and before registration. It was therefore impossible for the plaintiff to register it. In such a case the plaintiff is clearly entitled to have a fresh document executed and registered just as he would be so entitled if, after execution, the document had been accidentally lost or destroyed.

The decision in *Nynakka Routhen* v. *Vavana Mahomed Naina Routhen* (2) is exactly in point. There a document, after execution, but before registration, was accidentally destroyed by fire, and the High Court held that the plaintiff was entitled to have a fresh document executed in the terms of that destroyed.

The High Court then observed "the execution of a fresh instrument " of sale is an act required to perfect the title sold to the plaintiff in the " way the contract between him and the first defendant intended it " should be perfected; and the cause of action, on which the prayer for " the enforcement of that act rests, is not attributable in any way to " breach of contract or neglect on the part of the plaintiff, nor does it " involve the doing of anything prejudicial to the first defendant. On " every just principle therefore the first defendant is under an obligation " to renew the sale-deed . . . and so place the plaintiff in the posi" tion to register the sale."

The District Judge has found that the plaintiff has paid consideration for the document and done everything on his part to complete the sale, but that the first defendant has fraudulently made away with the document before registration. On these findings and having regard to the true principles applicable in [21] such cases as set forth above, we must set aside the decrees of the lower Courts dismissing the suit, and give judgment for plaintiff with costs throughout.

The defendant must execute and register a document in the terms of Exhibit A within six weeks from this date.

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(1) 16 M. 341. (2) 5 M.H.C.R. 123.

20 M. 21.

1896
Oct. 22.

APPEL-
LATE
CIVIL.

20 M. 21.

## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.*

NARAYANAMMA (*Petitioner*) *v.* KAMAKSHAMMA, (*Counter-petitioner*).*
[16th and 22nd October, 1896.]

*Civil Procedure Code, Sections* 617, 647—*Village Court's Act* (*Madras*)—*Act I of* 1889, *Section* 13, *proviso* 3—'*Land*' *includes house.*

*In* Act I of 1889, Section 13, proviso 3, the word land includes land covered by a house and consequently a suit for house-rent unless due under a written contract signed by the defendant is not cognizable in a Village Munsif's Court.

CASE stated for the opinion of the High Court under Sections 617 and 647, Civil Procedure Code, by Y. Janakiramayya, District Munsif of Tirupati, in suit No. 32 of 1895 on the file of the Village Munsif of Puthur.

The facts appear sufficiently from the letter of reference, which was as follows:—

"The counter-petitioner, Kamsala Kamakshamma, brought on 21st "September 1895 a suit (suit No. 32 of 1895) against the petitioner Ghan-"dhavady Narayanamma in the Village Court of Puthur for Rs. 19, "arrears of rent for a house due on an oral lease. The Village Munsif "passed a decree in plaintiff's favour on 18th November 1895, and the "defendant preferred an application to this Court under Section 73 of the "Village Courts Act (Madras Act I of 1889) on the ground, *inter alia*, "that the Village Court has no jurisdiction to try the suit. The petition-"er's pleader contends that suits for house-rent on oral leases are "excepted from the jurisdiction of the Village Courts by Section 13, "proviso (3), while the counter-petitioner's pleader contends that the "expression 'land' in the said proviso does not include house and is "meant to cover only agricultural lands, but neither houses [22] nor "dwelling sites; relying on this construction of the proviso, the learned "vakil contends that the suit in question is cognizable by a Village "Court under the main section (Section 13).

"The points referred for the decision of Honourable the Judges of "the High Court are whether the word 'land' in proviso (3), Section 13, "of the Village Courts Act includes houses and dwelling sites also, and a "suit for rent for a house is cognizable by a Village Court when it is not "due "*upon a written contract signed by the defendant.*" My answer to "the first question is in the affirmative and to the second question is in "the negative. I have no doubt that the word 'land' in Section 13 is used "in a very wide sense and includes houses and dwelling sites also. The "policy of the Village Courts Act seems to me to exclude all rent suits "from the jurisdiction of the Village Courts when the rent is not due on "any written contract, and the reasons for adopting this policy are obvious. "The legislature must have thought it dangerous to invest these illiterate "and inferior tribunals, *viz.*, Village Courts, with power to try questions "relating though incidentally, to title to immoveable property, and to the "abatement, increase, or decrease of rents which questions may not "unfrequently crop up in rent suits if the terms of the leases are not "reduced to writing. A suit for rent for an agricultural land, on an "oral lease, is admittedly not cognizable by Village Courts, and I cannot "see why a similar suit for a house-rent should be made cognizable by

* Referred Case No. 6 of 1896.

1896 Oct. 22. — Appellate Civil. — 20 M. 21.

"such Courts; the same reasons and considerations are applicable alike "to both classes of suits (suits for house-rent as well as rent on agricul-"tural lands). Holding this opinion as I do, I have held that the Village "Court of Puthur has no jurisdiction to try the suit in question and set "aside with costs the decree passed by it. But, as the counter-petitioner's "pleader requests me to state the case for an opinion of the Honourable "High Court, and as there are not any decisions on the point I am aware "of, and as it is said that the practice in this matter is not uniform in "several Courts, I venture to state this case for an authoritative ruling "from Honourable the Judges and have made my order setting aside the "Village Court's decree, contingent on their opinion."

The parties were not represented.

## JUDGMENT.

The house-rent in question was not alleged to be due upon a written contract signed by the defendant. The case, [23] therefore, falls under proviso 3 to Section 13 of Act I of 1889, which lays down that a Village Munsif cannot entertain a suit for rent of land, unless such rent is due upon a written contract signed by the defendant. In Civil revision petition No. 48 of 1894, Best, J., held the proviso to be inapplicable to a claim for house-rent. But we are unable to agree with the learned Judge, as we see nothing in the language of the proviso or in the reason for the enactment thereof to make us suppose that the term 'land' is used in a restricted sense excluding land built upon from the operation of the proviso. In the absence of any ground for putting such a limited construction on the term in question, it should, we think, be understood in its ordinary sense, which of course includes land not covered by buildings as well as that so covered. It follows that the Village Munsif had no jurisdiction to entertain the suit, and the conclusion of the District Munsif is right.

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**20 M. 23.**

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

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Pattabhiramayya Naidu and others (*Defendants Nos.* 1, 2, 6, 20, 22, 23, 24, 27, 31, *and* 33), *Appellants v.* Ramayya Naidu and another (*Plaintiffs*), *Respondents.**
[16th September, 1896.]

*Limitation Act XV of* 1877, *Schedule, II, Articles.* 61, 99, 120—*Decree for rent against tenants jointly—Execution against one defendant—Suit by him for contribution.*

The holder of a zamindari village obtained a decree jointly against sixty-eight persons, including the present plaintiff and defendants, for Rs. 4,100, being rent accrued due on lands in the village and in execution he brought to sale property of the plaintiff and on 28th October 1889 he received, out of the sale-proceeds, Rs. 2,650. The share payable by the plaintiff was Rs. 183-10-10 only, and he instituted the present suit against the defendants on 28th October 1892 to recover the amounts which they were liable to contribute:

*Held*, that Limitation Act, Schedule, II, Article 99, did not govern the case and that whether Article 61 or Article 120 was applicable, the suit was not barred by limitation.

[R., 26 A. 407 (425) (F.B.) = A.W.N. (1904) 74 ; 26 M. 686 (695) (F.B).]

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* Second Appeal No. 731 of 1895.

1896 Sep. 16. — Appellate Civil. — 20 M. 23.

SECOND appeal against the decree of J. P. Fiddian, District Judge of Ganjam, in appeal suit No. 48 of 1894, confirming the decree of [24] C. Badayya Pantulu, District Munsif of Sompet, in original suit No. 625 of 1892.

This was a suit to recover by way of contribution Rupees 1,288-13-4 from the defendants 1-35 according to the shares specified in the list presented with the plaint.

The plaint, presented on 28th October 1892, set out that, on 24th September 1879, that the late Jayanti Kamesen Pantulu rented the village of Nandigam from Gajapaty Radhika Patta Mahadevi, Zemindarni of Tekkali, for three years, Faslis 1288 to 1290, and transferred the same to one Attada Kurmi Naidu for Rs. 7,000: that the latter brought a suit in the Ganjam District Court in original suit No. 2 of 1883 against sixty-eight persons including the plaintiffs for Rs. 4,100, rent due for Fasli 1289, and obtained a joint decree against all of them; that in execution of this decree, the said Kurmi Naidu put the plaintiffs' lands to sale and received Rs. 2,650 on 28th October 1889 from the sale proceeds of the lands; that out of this sum the plaintiffs' share of rent. according to the Veelu Jabita (list of rents) of the village, comes to Rs. 183-10-10, and the defendants and other persons not in this suit were bound to contribute to the plaintiffs the remaining sum of Rs. 2,466-5-2, out of which the defendants ought to pay the suit amount.

Both the lower Courts found that the amounts claimed from each defendant were due, and gave a decree for the plaintiff as prayed overruling the plea of limitation.

Defendants 1, 2, 6, 20, 22, 23, 24, 27, 31 and 33 appealed.

*Bhashyam Ayyangar*, for appellants.

*Sadagopachariar*, for respondents.

## JUDGMENT.

The only plea urged before us is that the suit is barred under Articles 61 and 99, Schedule 2 of the Indian Limitation Act, on the ground that the suit was not brought until more than three years had elapsed from the realization of the money from plaintiffs by sale of their property by the Court.

We think that the words of Article 99 show that it cannot apply to a case like this where not the *whole*, but only a *part*, of the money due under a joint decree was realized from plaintiffs.

We think, too, that it may be doubted whether Article 61 is applicable to the present case where there was no payment by plaintiffs, but where their property was seized and sold by the Court and the proceeds paid by the Court to the decree-holder. If, [25] however, that article does apply, then we are disposed to adopt the view of the learned Judges in *Fuckoruddeen Mahomed Ahsan* v. *Mohima Chunder Chowdhery* (1) and to hold that time begins to run from the date of the payment to the decree-holder, not from the date of the realization of the money by the Court. If Article 61 does not apply, then the case falls under the general article No. 120, and the plaintiffs have six years within which to bring their suit. In any view, therefore, the suit is in time.

We confirm the decree of the Lower Appellate Court and dismiss this second appeal with costs.

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(1) 4 C. 529.

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APPELLATE CIVIL.

20 M. 25=
6 M.L.J. 259.

20 M. 25=6 M.L.J. 259.

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

KANAKAMMAL AND OTHERS (*Defendants*), *Appellants v.* RANGACHARIAR AND ANOTHER (*Plaintiffs*), *Respondents.**
[18th September, 1896.]

*Civil Procedure Code, Section 562—Remand—Preliminary point.*

Where a District Munsif, without entering into the merits of a case, dismissed a suit on the ground that the plaintiffs had no cause of action, and on appeal the Appellate Court reversed his decree and remanded the case :

*Held*, that the suit had been disposed of upon a preliminary point within the meaning of Section 562, Civil Procedure Code, and that the remand was right.

[F., 7 M.L.T. 125; R., 2 P.R. 1908 (F.B.)=96 P.L.R. 1908=12 P.W.R. 1908; 56 P.R. 1908=161 P.L.R. 1908=107 P.W.R. 1908.]

APPEAL against the order of P. Narayanasami Ayyar, Subordinate Judge at Negapatam, in appeal suit No. 18 of 1895, reversing the decree of N. Sambasiva Ayyar, District Munsif of Trivadi, in original suit No. 38 of 1894.

The facts of the case were as follows :—

"Suit to declare that the alienation made by first defendant to second "defendant and the alienations by second defendant to the other defend- "ants Nos. 3 to 5 of the plaint lands are not valid as against plaintiffs "who are entitled to succeed to them on first defendant's death.

"The property in dispute belonged to one Allundu Krishnamachariar. "He left a daughter named Kanakammal. Her [26] husband Srinivasa- "chariar left two sons Srinivasaraghavachariar and Venkatachariar. The "former had two sons Rangachariar and Raghavachariar. The former "is the first plaintiff in this suit and the latter having died, his son "is the second plaintiff. The said Kanakammal is the first defendant. "Venkatachariar the second defendant and defendants Nos. 3 to 5 are the "alienees under second defendant. The plaintiffs' case is that the property "in dispute was made a gift of by Allundu Krishnamachariar in 1858 to "Srinivasaraghavachariar, his grandson by his daughter, that patta was "transferred to his name that he enjoyed the property up to 14th "February 1875, when he executed a will devising it in favour of his "mother, the first defendant, for her maintenance that she continued to "enjoy the property up to 17th August 1888, when she executed a deed "of settlement making a gift of it in favour of second defendant who "since alienated the property to defendants Nos. 3 to 5.

"The defendants deny the said gift of 1858 and state that the pro- "perty devolved on first defendant by right of inheritance from her father, "that plaintiffs have no right to the property and that the second defend- "ant is first defendant's reversioner.

"The District Munsif dismissed the suit on the preliminary point "that plaintiffs have no cause of action to bring this suit and they appeal."

On appeal the Subordinate Judge reversed the decree of the Munsif and remanded the suit to be disposed of on the merits.

Exhibit I was as follows :—

* Appeal against order No. 174 of 1895.

"Settlement-deed, dated 17th August 1888, executed by me, Kanakammal, wife of Chakravarthi Sreenivasachariar, caste Brahmin, religion Vishnavite, housewife, residing at Periatheru (Big street), Kumbakonam, in favour of my son Chakravarthi Venkatachariar, caste Brahmin, religion Vishnavite, occupation Miras. **1896 Sep. 18.** — **Appellate Civil.** — **20 M. 25 = 6 M.L.J. 259.**

"As you are alone entitled to get, after me, the lands particularized hereunder which belonged to my father Krishnamachariar and which after his death, without male issue, passed into my hands and have been in my enjoyment, and (further) out of the affection which I bear towards you and the service you render to me, I have this day given over to you the nunjah, punjah, &c., lands mentioned hereunder and of the value of Rs. 2,500, together with all samudayams, poramboke, &c., appertaining thereto as per custom of the village; hence you shall yourself enjoy the said **[27]** lands, with all rights and with powers of disposition over them, such as gift, sale, &c. I have this day delivered possession of the said lands to you."

Defendants appealed.

*Krishnasami Ayyar*, for appellants.

*Seshagiri Ayyar*, for respondents.

## JUDGMENT.

We think that the District Munsif did decide the suit on a preliminary point within the meaning of Section 562, Civil Procedure Code (*Ramachandra Joishi* v. *Hazi Kassim* (1)). The order of remand was therefore legal.

As to the merits of the remand order, it is urged that Exhibit I is merely a transfer of the life interest of the first defendant so as to accelerate the succession of the next heir. We observe that there is no statement in Exhibit I, that a life interest merely is transferred, and the concluding words in which she speaks of the donee possessing henceforth full powers of sale, &c., indicate that the woman purported to transfer such absolute interest. We observe further that the donee at once proceeded to exercise the rights of an absolute owner and transferred the property to the defendants Nos 3 to 5. In these circumstances, we think that the view taken by the Subordinate Judge is correct, and that plaintiffs had a cause of action.

We therefore dismiss this appeal with costs.

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**20 M. 27 (F.B.).**

## APPELLATE CRIMINAL—FULL BENCH.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

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## Reference Under Stamp Act, Section 46.*

[5th September, 1896.]

*Stamp Act—Act I of* 1879, *Section* 46, *Schedule I*, *Article* 21—*Conveyance.*

The amount payable on a conveyance under Stamp Act, Schedule I, Article 21, is properly calculated on the consideration set forth therein; and not on the intrinsic value of the property conveyed.

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* Referred Case No. 16 of 1895.

(1) 16 M. 207.

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Sep. 5.
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Full
Bench.
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20 M. 27
(F.B.).

This was a case stated for the opinion of the High Court by the Board of Revenue under Section 46 of the Indian Stamp Act, 1879, on the 16th August 1895.

[28] The Acting Collector of Kistna referred the case to the Board of Revenue as follows:—

"Two persons—Pitchayya and Venkannah—executed a conveyance "on 3rd July 1893 on a 30-rupees stamp, transferring their title and "interest in a certain estate to one Korrapati Paupiah. In this docu-"ment Rs. 3,000 was stated to be the amount of consideration for the "transaction.

"When the document was presented for registration before the Sub-"Registrar of Isallapalli, a petition was presented to this office by one "Purnayya of Isallapalli, stating that the document was undervalued for "the purpose of evading the payment of stamp duty.

"This petition was forwarded to the District Registrar. In reply, he "requested me in his letter No. 1141, dated 25th May 1893, to get the "property valued by the Tahsildar of Bandar. It appears also that the "District Registrar instructed the Sub-Registrar not to return the docu-"ment pending inquiry.

"A Revenue Inspector of Bandar taluk, deputed for the purpose, "valued the property with the aid of two arbitrators and assessed the "value at Rs. 10,041-5-6.

"While the process of valuation was going on, the Registrar and the "Sub-Registrar received similar complaints of under-valuation. The "Registrar in his letter No. 1239, dated 6th August 1893, informed me "that he asked the Sub-Registrar to impound the document and send it "to me for adjudication of stamp duty, and the Sub-Registrar accord-"ingly forwarded it to me with his letter No. 216, dated 17th August 1893.

"On this it was ordered that the deficient stamp duty of Rs. 70 *plus* "a penalty of Rs. 350 should be paid, and it was remarked the case did "not call for prosecution. The Tahsildar of Bandar was directed to in-"timate the fact to the parties and report at the end of a month whether "this amount had been collected.

"The Tahsildar in his arzi No. 403, dated 12th December 1893, "reported that the stamp duty and penalty had been collected."

The Board of Revenue in referring the matter to the High Court said:—

"The Board ruled that, under Article 21 of Schedule I of the Stamp "Act, the stamp duty must be levied on the amount of the consideration "for the conveyance as set forth in the deed, *viz.*, Rs. 3,000; and that if "the Collector had reason to believe [29] that the amount of the con-"sideration was falsely stated in the deed, he should take action with "a view to prosecute the offenders under Section 63.

"The penalty levied in the case was ordered to be refunded.

"The Collector now reports that the parties concerned in the above "case were prosecuted, but were acquitted, as it was very doubtful that "there was an under-valuation fraudulently made for the purpose of depriv-"ing Government of stamp duty; that although the property was worth "about Rs. 10,000, the vendor had not possession of it, and it had been "sold to the vendee for the small sum of Rs. 3,000, as it was probable "that protracted litigation with a certain individual who held possession "of the lands would be necessary before the vendee could get possession "of them.

"Under the circumstances the Board considers that the petitioners "are entitled to a refund of the deficient stamp duty erroneously levied, "and solicits the orders of the Honourable the Judges of the High Court, "as the Board has no power to sanction it." 1896 SEP. 5. — FULL BENCH. — 20 M. 27 (F.B.).

*Venkatarama Sarma*, for vendors.

OPINION.

We are of opinion that the proper stamp duty leviable on the conveyance was Rs. 30, that being the amount payable on the consideration as set forth therein.

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**20 M. 29.**

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Benson.*

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SAMINATHA AYYAN (*Defendant*), *Appellant v.* MANGALATHAMMAL (*Plaintiff*), *Respondent.** [28th September, 1896.]

*Provincial Small Cause Courts Act—Act IX of* 1887, *Schedule II, Article* 33—*Suit for arrears of maintenance.*

A suit for arrears of maintenance payable under a written agreement does not lie in a Provincial Small Cause Court.

[F., 10 A.L.J. 185=16 Ind. Cas. 13 (14); 1 O.C. 93.]

**[30]** SECOND appeal against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in appeal suit No. 540 of 1894, reversing the decree of J. C. Fernandez, District Munsif of Shiyali, in original suit No. 99 of 1894.

The facts of this case as set forth in the District Munsif's judgment were as follows :—

"The plaintiff sues to recover from defendant Rs. 138-0-6, being "maintenance with interest thereon alleged to be due under an agreement "executed to her by defendant's deceased father and three others on the "19th May 1874, undertaking to pay her maintenance at the rate of Rs. 7 "per month. The maintenance claimed is alleged to be due for defendant's "father's one-fourth share from the 20th May 1889 up to the date of the "plaint.

"The defendant pleads that plaintiff has no right under the agreement sued on to claim separately defendant's father's share of the "maintenance stipulated for, and that plaintiff has no cause of action "against him as he did not derive any assets from his father."

The District Munsif dismissed the suit with costs.

On appeal the Subordinate Judge gave the plaintiff a decree against the defendant as the legal representative of his father deceased.

Defendant appealed.

*Krishnasami Ayyar*, for appellant.

*Sundara Ayyar*, for respondent.

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* Second Appeal No. 778 of 1895.

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SEP. 28.

APPELLATE CIVIL.

20 M. 29.

## JUDGMENT.

A preliminary objection is raised that no second appeal lies in this case inasmuch as the suit is one for Rs. 138-0-6, and is of a nature cognizable by a Court of Small Causes. The suit is to recover the above sum under an agreement, Exhibit A, whereby the defendant's father and others promised to pay maintenance at the rate of Rs. 7 per mensem to the plaintiff. In other words, it is a suit to recover arrears of maintenance fixed by contract at a certain monthly sum.

We are of opinion that this is "a suit relating to maintenance" and therefore excluded from the jurisdiction of a Small Cause Court (Article 38, Schedule 2, Act IX of 1887). It is argued that the decision in *Komu* v. *Krishna* (1) is an authority opposed to this view; but we observe that this is not so, for that case was [31] decided under the law (Act XI of 1865) in force before Act IX of 1887 was passed, and the terms of that Act were quite different from those of the present Act.

Under the old Act certain suits relating to maintenance, *viz.*, those for maintenance claimed on a special bond or contract had been decided by the Courts to be cognizable by a Court of Small Causes, while suits to determine the amount of maintenance had been decided not to be so cognizable (*Sidlingapa* v. *Sidava Kom Sidlingapa* (2), *Nurbibi* v. *Husen Lal* (3). The language of the present Act was apparently adopted so as to exclude from the cognizance of the Small Cause Court suits for maintenance claimed on a special bond or contract, which, under the former law, were held to be triable by a Small Cause Court (*Bhagvantrao* v. *Ganpatrao*(4)).

We, therefore, disallow the preliminary objection. On the merits the only ground of appeal argued before us is that, as there is no proof that the defendant received assets from his father, the suit against him personally ought to have been dismissed. We observe that the decree is merely against the defendant as the legal representative of his late father, and such decree can only be executed against assets of the father in defendant's hands. The second appeal fails and is dismissed with costs.

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**20 M. 31 = 1 Weir 83.**

## APPELLATE CRIMINAL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.*

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### QUEEN-EMPRESS *v.* KRISHTAPPA.*

[16th October, 1896.]

*Penal Code, Section 174—Non-attendance in obedience to an order of a public servant—Absence of public servant.*

The offence contemplated by Section 174, Penal Code, is an omission to appear at a particular time and at a particular place before a specified public functionary. Where therefore the public servant was absent on the date fixed in a summons:

[32] *Held*, that the person summoned could not be convicted under this section, though he failed to attend, having the intention to disobey the summons.

[R., 3 S.L.R. 155 (Cr.).]

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* Criminal Revision Case No. 415 of 1866.

(1) 11 M. 134. (2) 2 B. 624. (3) 7 B. 537. (4) 16 B. 267.

CASE referred for the orders of the High Court under Section 438 of the Code of Criminal Procedure by K. C. Manavedan Raja, Acting District Magistrate of Anantapur. 1896 OCT. 16.

The facts of this case appear sufficiently from the judgment of the High Court. APPELLATE CRIMINAL.

The parties were not represented.

20 M. 31= 1 Weir 83.

JUDGMENT.

The accused, the karnam of Maravapalli village, on being summoned by the Tahsildar of Gooty to appear before him at Gooty on a particular day, failed to attend. For the non-attendance he was convicted under Section 174, Indian Penal Code. It appears that, on the day fixed, the Tahsildar was absent from the station on public business.

Now it is manifest that the offence contemplated by the section is not an omission on the part of the person summoned to be at a particular place and at a particular time, but an omission to appear at such time or place *before a specified public functionary*. Moreover, the object of the summons was the meeting between the two. How could this object be realised unless the person summoning was present to meet the person summoned? Would it not have been futile, even if the latter turned up at the fixed place? But the law compels no man to do that which is futile or fruitless. *Lex neminem cogit ad vana seu inutilia peragenda.* No doubt in this case the accused did not say that he failed to go to Gooty because of the Tahsildar's absence. Assuming that he intended to disobey the summons, such intention alone is, of course, not punishable under Section 174, or under any other provision of law.

We, therefore, set aside the conviction and order the fine, if levied, to be refunded.

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**20 M. 33=6 M.L J. 278.**

## [33] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

RAGAVENDRA AYYAR (*Plaintiff*), *Appellant v.* KARUPPA GOUNDEN AND OTHERS (*Defendants*), *Respondents.**
[10th August and 15th September, 1896.]

*Rent Recovery Act—Act VIII of* 1865 (*Madras*), *Sections* 38, 39. 40—*Limitation Act—Act XV of* 1877, *Article* 12.

Where a plaintiff sued to recover land alleged to have been sold under the provisions of the Rent Recovery Act, alleging that the provisions of Section 7 of that Act had not been complied with and that therefore the sale was illegal:

*Held*, that the suit could not proceed without setting aside the sale and that the sale having taken place more than a year before the institution of the suit, the suit was barred.

SECOND appeal against the decree of M. B. Sundara Rau, Subordinate Judge of Salem, in appeal suit No. 25 of 1893, reversing the decree of Syed Tajudin Saheb, District Munsif of Namakkal, in original suit No. 411 of 1891.

This suit was brought for the recovery of certain land which had been sold under the provisions of Act VIII of 1865 and purchased by the

* Second Appeal No. 419 of 1895.

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second defendant, who resold it to the third defendant under the circumstances set forth in the judgment of Subramania Ayyar, J.

The District Munsif gave a decree for the plaintiff, which was reversed on appeal by the Subordinate Judge.

The plaintiff appealed.

*Sadagopachariar* and *Krishnasami Ayyar*, for appellant.

*Srirangachariar*, for respondents.

JUDGMENT.

SUBRAMANIA AYYAR, J.—The facts of the case material for our present purpose are as follows:—The land, for the possession of which the appellant sues, was held by him under a mittadar who is a landlord within the meaning of the Rent Recovery Act (VIII of 1865) and the interest possessed by the appellant in the land was a saleable interest. The landlord, alleging that the rent due by the appellant for fasli 1297 was not duly [34] paid, proceeded to recover the amount by sale of the latter's interest in the land under the provisions of the enactment referred to. On the notice prescribed by Section 39 of the Act being served by the landlord upon the appellant, he filed a summary suit under Section 40, questioning the legality of the landlord's proceedings, chiefly on the ground that exchange of patta and muchilika had not been dispensed with and that there was neither an interchange of such engagements between him and the landlord, nor a tender of a proper patta to the former by the latter as required by Section 7. But the suit was dismissed, as the appellant failed to prosecute it. Thereupon the Collector directed the appellant's interest to be sold, and it was sold on the 31st August 1889 and purchased by the second respondent, who subsequently conveyed his right to the third respondent. This suit was brought in September 1891.

The first question for determination is whether the suit is time-barred. Though the plaint does not pray for a cancellation of the sale, there is no doubt that the relief claimed cannot be granted without setting aside the sale, unless it was *ab initio* null and void, and therefore did not require to be set aside as contended on behalf of the appellant. In support of this contention his vakil relied upon the alleged omission, referred to above, on the landlord's part to comply with the provisions of Section 7 of the Act. But this argument is palpably unsound.

Special powers, like those exercised by the Collector under the Act, may be circumscribed (*a*) with respect to place, (*b*) with respect to persons, (*c*) with respect to the subject-matter of those powers (*Narohari* v. *Anpurnabai*(1)). Now, as to the first, no question arises here. As to the second, the appellant and the mittadar were undoubtedly persons falling within the class of tenants and landlords to whom the enactment applies; and as to the third, the interest sold was of a description liable to be seized and transferred at the instance of the landlord.

Therefore the non-compliance with the provisions of Section 7 relied on on behalf of the appellant, though it has an essential bearing on the party's right to enforce the terms of the tenancy, has yet none with reference to any of the three matters as to which jurisdiction might be shown to fail.

[35] Consequently the order under which the sale in the present case took place was passed with jurisdiction and, if the sale be impeachable, it can be impugned only in a suit instituted within one year from

(1) 11 B. 160.

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the date mentioned in Article 12 of the Limitation Act. This action, having been brought long after expiry of that period, was clearly barred. It is therefore unnecessary to consider the other questions urged.

The appeal fails and must be dismissed with costs.

Benson, J.—I am clearly of opinion that the appellant cannot succeed without setting aside the revenue sale, and this can only be done by suit brought, within one year.

No such suit having been brought, the sale stands good.

I agree that the appeal fails and must be dismissed with costs.

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**20 M. 35 = 6 M.L.J. 235.**

## APPELLATE CIVIL.

*Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.*

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Muthu Vijia Raghunatha Ramachandra Vacha Mahali Thurai (*Son and Legal Representative of the deceased Defendant* No. 3), *Appellant v.* Venkatachallam Chetti and others (*Plaintiff and Defendants Nos.* 1, 2 *and* 4 *to* 10), *Respondents.** [14th August and 7th, 8th and 29th September 1896.]

*Transfer of Property Act—Act IV of* 1882, *Section* 86—*Suit by sub-mortgagee—Decree for sale.*

A sub-mortgagee is entitled to a decree for the sale of the original mortgagor's interest in cases and in circumstances which would have entitled the original mortgagee on the date of the sub-mortgage to claim such relief.

[**F.**, 12 C.L.J. 357 = 7 Ind. Cas. 166 (169); 3 Ind. Cas. 311 = 14 C.W.N. 165; 5 Ind. Cas. 834 = 7 M.L.T. 125 = (1910) M.W.N. 4; 9 O.C. 233; (1900) P.L.R. 219 (**F.B.**); **Rel. on,** 10 C.L.J. 470 = 4 Ind. Cas. 433 (434); **Ap.,** 27 A. 472 = 2 A.L.J. 162 = A.W.N. (1905) 58; **R.,** 29 A. 385 (**F.B.**) = 4 A.L.J. 273 = A.W.N. (1907) 97; 35 B. 342 (346) = 12 Bom. L.R. 1044 = 8 Ind. Cas. 752; 9 C.L.J. 429 (431); 12 C.L.J. 137 (139) = 5 Ind. Cas. 654; 16 Ind. Cas. 601 (603) = 23 M.L.J. 430 (433) = 12 M.L.T. 315 = (1912) M.W.N. 919; 1 O.C. 59; 1 O.C. 105; 5 O.C. 335; U.B.R. (1906), Sub-mortgage, 1.]

Appeal against the decree of P. Narayanasami Ayyar, Subordinate Judge of Madura (East), in original suit No. 14 of 1893.

The plaintiff was the trustee of a temple, and he sued to enforce his mortgage right on certain property which originally belonged to defendants Nos. 2 and 3 jointly. On the 9th of August 1886, those defendants respectively, borrowed Rs. 3,000 and Rs. 4,825 from defendant No. 1 on the security of the land under a [36] registered mortgage deed. On the following day defendant No. 1 on the security of this mortgage borrowed Rupees 7,300 from one Avichi Chetti under a registered mortgage deed. On 23rd November 1889, Avichi Chetti assigned to the plaintiff his rights under the mortgage of 10th August 1886 for Rs. 10,898-4-8.

The Subordinate Judge passed a decree as follows:—

"It is ordered that the first defendant do pay plaintiff Rs. 9,372-10-0 "within six months from this day together with subsequent interest at "six per cent. per annum, and in default the interest of the third defend-"ant in items 1 to 7 be sold for Rs. 8,294-4-0 with subsequent interest "at six per cent. per annum on Rs. 4,825 from date of plaint up to date "of payment; as the plaintiff is entitled to recover only the sum paid by "him for the assignment with interest from date of payment to date of "decree and the incidental expenses of sale (*Nilakanta* v. *Krishna*-

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* Appeal No. 13 of 1895.

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20 M. 35 = 6 M.L.J. 235.

"*sami* (1) and *Ramachandra* v. *Venkatarama* (2)), the said sum represents "third defendant's proportionate share of the debt which he should pay "under Exhibit A, item No. 4, will be sold subject to eighth defendant's "mortgage right in $\frac{5}{8}$ chey therein as admitted by plaintiff, and items "Nos. 1, 5, 6 and 7 will be sold subject to first defendant's mortgage "right therein as stated in the plaint. The parties are ordered to bear "their own costs."

The representative of defendant No. 3 preferred this appeal.

*Krishnasami Ayyar*, for appellant.

*Bhashyam Ayyangar* and *Rangaramanujachariar*, for respondents Nos. 11 and 12.

*Rangachariar*, for respondent No. 3.

## JUDGMENT.

SUBRAHMANIA AYYAR, J.—The late third defendant, father of the appellant, on the 9th August 1886, executed to the first defendant a simple mortgage on the security of the third defendant's moiety of eight villages attached to the Zemindari of Elayathakudi in Madura. The first defendant on the 10th idem sub-mortgaged his mortgage interest to one Avichi Chetti. This man assigned his rights to the plaintiff who instituted this suit upon the sub-mortgage transferred to him.

In the Court below the Subordinate Judge took an account of the amount due by third defendant to the first and by the latter to the plaintiff, and among other reliefs, granted the usual order [37] for the sale of the third defendant's interest in the property originally mortgaged, if payment of the amount, due by him, be not made within the time fixed.

The first question for decision is whether a sub mortgagee is entitled to an order for sale of the original mortgagor's interest, if other circumstances justifying such a decree exists.

In contending that the sub mortgagee was not so entitled the vakil for the appellant urged that there is no warrant whatever in the Transfer of Property Act, for an order like the one in question being passed. This argument seems to be quite opposed to the express provisions of Section 86 of the Act, since the words "where the plaintiff claims by derived title," which are to be found therein distinctly cover such a case as this. It was said, however, that the clause just quoted refers only to an assignee or other person in whom the whole of the interest of the mortgagee has become vested, but not to a sub-mortgagee who has only a qualified right therein. But I am at a loss to understand how it can possibly be denied that a sub-mortgagee does claim by title derived from the original mortgagee and it is scarcely necessary to point out that "derivative mortgagee" is a term used in text books and in decided cases as synonymous with "sub-mortgagee." I am, therefore, unable to see any adequate ground for putting the restricted construction suggested on behalf of the appellant and to exclude, from the operation of the section referred to, the case of a sub-mortgagee, which the words, in question, naturally and grammatically comprehend.

If we turn to the English law, we find there also, from Section 12 of Chapter 47 of "Seton on decrees" and *Hobart* v. *Abbot* (3) cited for the respondents, that the point has long been settled in favour of the sub-mortgagee.

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(1) 13 M. 225. (2) 13 M. 516. (3) 2 Peere Williams, 642.

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Nor is the above view unsupported by principle. It is true that in the case of a simple mortgage, the mortgagor's ownership in the property mortgaged is not, even in form, transferred to the mortgagee. Nevertheless it is impossible to doubt that the mortgagee, so far as the recovery of the debt owing to him is concerned, is treated in law, as an assignee of the mortgagor. This becomes quite evident in the case of a second mortgage. Referring to it, an American author of high repute writes: "Thus "a second [38] mortgage is as to the second mortgagee, but an assignment "of the mortgagor's interest . . . . As an assignee of the mortgagor "the second mortgagee may insist upon all the rights of a mortgagor against "the first mortgagee, such as that of calling him to account, redeeming "from him and the like." (Washburn on Real Property, 5th edition, Vol. II, pp. 116 and 117). This way of looking at the matter is not peculiar to any particular system of law, but seems well established in jurisprudence, as treatises on the Civil law show. In Salkowski's work on Roman Private Law, it is pointed out that a party who holds a hypothecation acts, in selling the hypotheca, as "the representative of the "pawnor or owner, although by virtue of his own right and in his "own interest." (Whitfield's Translation at page 491). Further it is a recognised rule under that law, that when what is hypothecated is a claim, the hypothecatee may alienate it or enforce it in action instituted in his own name (Mackeldey's Roman Law, Special Part, Book I, Section 336, paragraph 2).

There is another argument in favour of the view that a sub-mortgagee has the right in dispute. The original mortgagor and the sub-mortgagee, as the holders of different interests in one and the same specific property, stand to one another in a relation that gives rise to certain rights and duties *inter se.* It is admitted that a mortgagor whose right to redeem originally existed as against the mortgagee alone, becomes by virtue of the sub-mortgage, entitled to excercise that right as against the sub-mortgagee also, who consequently must be made a party to redemption proceedings. Now, as the sub-mortgagee may be redeemed by the original mortgagor, it ought to be held that the former may foreclose the latter, where that relief can be claimed or, where such relief cannot be granted, he may obtain an order, for sale and thereby put an end to the other party's right to redeem. For it is only just and reasonable that, whilst the law, on the one hand, recognizes a right in the original mortgagor to redeem the sub-mortgage, it should give the latter, as against the former, the generally correlative right (Daniel's Chancery Practice, 6th edition at page 1412) to foreclose or sell.

I confess I am not impressed with the suggestion, made on behalf of the appellant, that to allow a sub-mortgagee to sue the original mortgagor, as was done here, would be productive of general inconvenience to litigants in the position of the present [39] parties. On the contrary I think that to permit such a course to be adopted would prevent multiplicity of suits and the possibility of conflicting decisions being pronounced in respect of the same matter; since, at all events, the accounts, between the original mortgagor and the original mortgagee on the one hand and the latter and the sub-mortgagee on the other, would be taken once for all and the respective claims of the three parties adjusted and settled at the same time. (See *Narayan Vital Maval* v. *Ganoji* (1).)

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(1) 15 B. 692.

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The Allahabad cases of *Mata Din Kasodhan* v. *Kazim Husain* (1) and *Ganga Prasad* v. *Chunni Lal* (2) relied on on behalf of the appellant, cannot be followed here, inasmuch as they proceed upon the supposition that the term "property" as used in Chapter IV of Act IV of 1882, means an actual physical object; and does not include mere rights relating to physical objects—a view which, so far as I am aware, has hitherto not been accepted as correct in this Court and in which I am myself unable to agree. As to *Padgaya* v. *Baji* (3), it is difficult to believe that the learned Judges who decided it, held that there was no sort of legal relation between the original mortgagor and the sub-mortgagee. The actual decision there is itself supportable on the clear ground that the representative of the deceased original mortgagee, as a person interested in the redemption there sought for, was a necessary party to the litigation which could not, therefore, proceed further owing to the omission, on the part of the original mortgagor, to bring on to the record, the legal representative of the original mortgagee who had been made a defendant when the suit was filed. The statement made in the course of the judgment of PARSONS, J., that there was no privity between the original mortgagor and the sub-mortgagee, if intended to lay down that absolutely none of any kind subsisted between those parties, would be totally inconsistent with the unquestionable fact, already referred to, *viz.*, the existence of that relation between them, from which springs the original mortgagor's right to redeem from the sub-mortgagee also.

I am, therefore, of opinion that the appellant's contention, under consideration, is unsound and that a sub-mortgagee can ask for a sale of the original mortgagor's interest in cases and in **[40]** circumstances which would have entitled the original mortgagee, on the date of the sub-mortgage, to claim such relief.

The second and the only remaining question for decision is, whether the discharge, set up on behalf of the third defendant, is true. I agree with the Lower Court that the evidence, called in support of the plea, is unsatisfactory and unreliable. Nor do I see any reason for discrediting the statement of the first defendant that no portion of the debt due to him was liquidated by the collections made by him from the tenants of two out of the eight mortgaged villages, under the power of attorney, Exhibit II, dated 9th August 1886, and that when the said power was revoked, a few months afterwards by Exhibit F, he accounted to the third defendant's father-in-law, with that defendant's knowledge, for the comparatively small amount that had been collected by him under the power. The decree of the Lower Court is in my view right. I would confirm it and dismiss the appeal with costs. The appellant will also pay the costs of the second defendant who was unnecessarily brought in.

DAVIES, J.—I concur.

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(1) 13 A. 432. (2) 18 A. 113. (3) 20 B. 549.

20 M. 40=6 M.L.J. 272.

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APPELLATE CIVIL.

20 M. 40= 6 M.L.J. 272.

# APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Davies.*

PARVATHI AMMAL (*Plaintiff*), *Appellant v.* SAMINATHA GURUKAL AND OTHERS (*Defendants*), *Respondents.**
[3rd, 5th and 24th November, 1896.]

*Limitation Act—Act XV of* 1877, *Schedule II, Article* 118—*Suit for possession by Hindu widow as heiress—Defendant in possession under an alleged adoption—Limitation.*

A Hindu died in 1884, leaving the plaintiff, his widow, and certain landed and other properties. The defendant claimed, to the knowledge of the plaintiff in 1885, to have been adopted by the deceased, and from that date he had claimed as an adopted son to be entitled to the estate of which the plaintiff never enjoyed [41] possession. She now sued in 1893 for possession with mesne profits alleging in the plaint that the adoption had been falsely set up, but seeking no declaration with regard to it :

*Held*, that the suit was barred by limitation.

[Diss., 24 A. 195=A.W.N. (1902) 10; 25 C. 354; 9 C.W.N. 222; F., 24 B. 260 (F.B.); 27 B. 614; 26 M. 291 (F.B.); 1 P.R. 1907=31 P.W.R. 1907; 20 P.R. 1902=11 P.L.R. 1902; R., 24 M. 405; 1 Bom.L.R. 799; 56 P.R. 1903 (F.B.)= 93 P.L.R. 1903; 68 P.L.R. 1903=13 P.L.R. 1904; D., 1 O.C. 35.]

APPEAL against the decree of E. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in original suit No. 27 of 1893.

The plaintiff was the widow of one Soma Gurukal who died in January 1884. She averred that he left no heirs other than herself and that on his death she entered into possession and remained in enjoyment for some years of the property forming his estate. The plaint further stated that the first defendant falsely claiming to be the adopted son of the deceased disturbed her enjoyment, in consequence of which she brought a declaratory suit in 1890, which was dismissed on the ground that it was not maintainable for the reason that it was not shown that the lands were then in her possession.

Paragraph 5 of the plaint was as follows : " During the pendency of " the said suit and subsequently, the first defendant and the other defend- " ants who claim right through him entered upon and usurped the lands " from the year 1891."

It was alleged that the cause of action arose in February 1891 and the prayer of the plaint was for possession of the specified properties with mesne profits and for such other reliefs, which to the Court might seem proper. The first defendant pleaded that he was adopted by the deceased on 15th August 1877, from which date he lived with him until his death and that since that event he had been in enjoyment of the property.

The Subordinate Judge held that the alleged adoption was established by the evidence. On the second and third issues which raised the questions as to whether the suit was maintainable as framed, seeing that there was no prayer that the adoption be set aside and whether it was barred by Limitation, the Subordinate Judge expressed an opinion on the first in favour of plaintiff and on the second in favour of the defendant. His judgment on this part of the case was as follows :—

" I am not prepared to say that the suit is unsustainable, because the " plaintiff has not expressly sought to have the first defendant's alleged

* Appeal No. 88 of 1895.

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"adoption declared untrue. The omission to ask for such a relief is "certainly not accidental but intentional. A suit for a declaration that an "alleged adoption had never taken **[42]** place, should be brought within six "years from the time when the party suing and entitled to sue for it came to "know the alleged adoption under Article 118 of Schedule II of Act XV of "1877. As the plaintiff in this case had known that the first defendant was "set up as an adopted son soon after her husband died in January 1884, her "advisers must have known that an express claim for such a declaration "would be at once met and that successfully by the plea of limitation; and "they have accordingly omitted it. But it seems to me upon the latest "authorities that, whether she prayed for it or not, the framing of the plaint "can give her no advantage. In the case of *Jagadamba Chaodhrani* v. "*Dakhina Mohun Roy Chaodhri* (1) decided by the Privy Council, 'it was "'settled that a suit to set aside an adoption within the meaning of these "'words in the Limitation Act need not be a suit having declaratory con-"'clusions, but that any suit in which the decree prayed for involves the "'decision of the question of the validity of an adoption set up in defence "'a suit to set aside an adoption.' These remarks were emphasized again "by their Lordships in the more recent case of *Mohesh Narain Munshi* v. "*Taruck Nath Moitra* (2). In the case then for consideration, there was, "like the present one, no prayer for a declaration that the defendant's "adoption was invalid or never took place, and their Lordships held that "that suit was, in substance, a suit 'to set aside an adoption' within the "meaning of Article 129 of Act IX of 1871, the Act of Limitation "which preceded Act XV of 1877, and which applied to the circumstances "of that case. Their Lordships observed in the first case quoted above "that the Legislature, having deemed fit to allow 'only a moderate time "'within which such delicate and intricate questions as those involved in "'adoptions shall be brought into dispute, it should strike alike at all suits "'in which the plaintiff cannot possibly succeed without displacing an "'apparent adoption by virtue of which the defendant is in possession.'

"The plaintiff's vakil in the present case adopted the contention of "the learned counsel for the plaintiffs in *Jagadamba Chaodhrani* v. *Dak-"hina Mohun Roy Chaodhri* (1) that she was suing not to set aside any "adoption, but to recover possession on her *prima facie* title as heir to the "deceased, that it was the defendant who alleged his adoption and that, "on his failure to prove it, it need **[43]** not be set aside, but taken "as never having existed; and relied on among other authorities *Basdeo* v. "*Gopal* (3), *Ganga Sahai* v. *Lekhraj Singh* (4) and *Sundaram* v. *Sitham-"mal* (5). The answer given by their Lordships to that argument which "they characterised as 'ingenious' was 'that the defendants are in posses-"'sion in the character of adopted sons: the *prima facie* title is with them "'and until that is displaced they ought to retain their possession' (see "*Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri* (1)). The "same answer should be given in answer to the plaintiff's contention. If "the plaintiff by reason of her laches failed to have the defendant's title in "virtue of an adoption declared untrue or invalid, within the time allow-"ed by law, which in the present case is six years from when the fact was "known to her, she cannot afterwards sue to deprive the defendant of the "possession he has.

"The last Allahabad case, though on all fours with the case now

(1) 13 C. 308 (318). (2) 20 C. 487. (3) 8 A. 644.
(4) 9 A. 253 (267). (5) 16 M. 311.

"under consideration, is no binding authority against the two rulings of "the Privy Council already quoted : and following the same I find that "the second issue should be decided in plaintiff's favour and on the third "issue that the suit is barred by the six years' rule of Article 118."

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In the result the Subordinate Judge dismissed the suit.

The plaintiff preferred this appeal.

*Narayana Rau* and *Sundara Ayyar*, for appellant.

*Bhashyam Ayyanyar*, *Desikachariar*, *Jivaji Rau* and *Kuppusami Ayyar*, for respondents.

## JUDGMENT.

SHEPHARD, J.—There is no doubt that the plaintiff knew of the first defendant's adoption as long ago as in 1885, that is more than six years before the institution of the present suit. The Subordinate Judge finds that since the death of Swarna Gurukal, the adoptive father, the defendant has been in possession, though for a time after his father's death his possession was disturbed. In 1890, a suit was brought by the plaintiff, alleging that she had all along, since her husband's death, been in possession of all his property. It was found in that suit that the plaintiff was not and never had been in possession of the property. It was necessary for the Judge to find whether the plaintiff was in possession at the **[44]** date of that suit, because she asked for a declaration of her title. It having been found that she was not in possession, the suit was dismissed on the 28th February 1891. In her present plaint, she alleges that she was dispossessed in that very same month. No attempt is made to prove this allegation, which in itself is most improbable, but it is suggested that the evidence shows that the plaintiff was in possession before 1890 and that it is open to her, notwithstanding the decree in the suit of 1890, to establish that possession. It is argued that, if she was in possession between 1884 and 1890, there was no occasion for her to challenge the first defendant's adoption and therefore Article 118 cannot properly be applied. Whatever weight may be due to this argument in a case in which the plaintiff can show an undisturbed possession in defiance of the alleged claim by adoption, the point does not really arise in the present case, because it is clear that the plaintiff's possession was at the best an interrupted and incomplete possession. The evidence seems to show rather that there was a constant struggle for possession on her part than that she was in actual enjoyment.

Holding, then, that the plaintiff is seeking to recover property of which she, since her husband's death, has not been in possession, and which has been all along claimed by the defendant in virtue of his alleged adoption, we have to consider whether the suit is barred by limitation. On the facts stated, it unquestionably would be barred, if the Act of 1871 still remained in force, for it has been decided by the Judicial Committee with reference to Article 129 in the schedule of that Act that a plaintiff, whose claim is met by the assertion of an adoption and cannot be made good without negativing the adoption, must bring this suit within the time fixed in that article. It is contended that the ruling of the Judicial Committee is not applicable to cases governed by the existing Act, or, in other words, that the law as it stood under the earlier Act has been altered by the passing of the Act of 1877.

Comparison between Article 129 in the schedule of the repealed Act and Article 118 of the Act of 1877 shows that an alteration of the language has been effected in all three columns. The period has been reduced from twelve years to six ; the starting point has been altered by

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substituting the date when the plaintiff knows of the adoption for the date of the adoption ; the description of the suit has been altered. This last alteration is the only [45] one material to the present question, for it cannot be suggested that the other alterations affect the applicability of the article. To support the plaintiff's contention, it is necessary to show that the change in the language descriptive of the suit points to a change of policy on the part of the legislature and to the intention to restrict the application of the article to suits in which a mere declaration is sought for. Unfortunately for this contention, we know the reason for the change of language and can, therefore, account for it fully without ascribing any change of policy to the legislature. It is plain, as is pointed out by the Judicial Committee in *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri* (1), and it also seems to have been pointed out before 1877, that the phrase "a suit to set aside an adoption" is an inaccurate one. Hence the substitution in the 118th article of the expression—"suit to obtain a declaration that an alleged adoption is invalid or never took place." I am at a loss to understand how this substitution which is in accordance with the observations of the Judicial Committee, though not consequent upon them, can be taken to effect a change of law in favour of the plaintiff. The observations of the Judicial Committee apply to the suit of a person in the present plaintiff's position, whether it is incorrectly called a suit to set aside an adoption or correctly called a suit to declare an adoption invalid. In *Mohesh Narain Munshi* v. *Taruck Nath Moitra* (2), there is a strong *dictum* to the effect that the plaintiff's position has not been altered for the better by the change of expression and in a later case, it appears to have been assumed that, notwithstanding the change, a plaintiff suing for possession must bring his suit within six years of his knowledge of the defendants' adoption. (*Lachman Lal Chowdhri* v. *Kanhay Lal Mowar* (3).) A string of cases was cited in which a different view of the law has been taken by other High Courts. I do not find in the judgments in those cases any sufficient reason given for attributing to the legislature an intention, which in itself is most improbable, when it is remembered that before the Act of 1871 was repealed, the interpretation put by the Judicial Committee on Article 129 had not been enunciated.

An argument is founded on the fact that the language descriptive of suit has not been changed in Article 91 corresponding [46] to Article 92 of the Act of 1871. (*Natthu Singh* v. *Gulab Singh* (4).) The reason for this is plain. The phrase "suit to cancel or set aside an instrument" is not an inaccurate one, and therefore there was no need to alter the language in the new Act. If it had been the object of the legislature to place parties challenging or maintaining an adoption in a position more favourable than that assigned to them by the Act of 1871, as interpreted by the Judicial Committee, the simplest course would have been to repeal Article 129 and leave declaratory suits, relating to adoption to be governed be the general article. The preservation of the special provision for suits in which such questions are raised, shows that the policy which actuated the legislature in 1871, was still maintained in 1877. The reduction of the period from twelve years to six in cases in which the plaintiff has from the first knowledge of the alleged adoption or of the fact that the adoption is denied, points to the desire to restrict, as far as possible, the time within which such questions may be raised. There was no need for the

(1) 13 C. 308 (318). (2) 20 C. 487 (494). (3) 22 C. 609. (4) 17 A. 167.

abbreviation of the period or indeed for the retention of any special article, if it was intended to apply only in cases in which the plaintiff seeks a declaration and nothing more. 1896 Nov. 24.

For these reasons, I am of opinion that the law has not been altered so as to make Article 118 inapplicable to the present suit and that, therefore, in the circumstances above stated, the suit is barred by the law of limitation. APPELLATE CIVIL.

DAVIES, J.—I concur in the conclusion of my learned colleague, as it appears clear, for the reasons stated by him, that the plain ruling of their Lordships of the Privy Council has not been in any way affected by the mere change in the wording as to the character of the suit in the new article. It has been urged, however, that the effect of that ruling may not have been foreseen and that it may lead to unnecessary litigation on the one hand or to a denial of justice on the other. 20 M. 40= 6 M.L.J. 272.

The case is put for instance that supposing the widow here had been in actual possession, there was no occasion for her to sue until she was ousted, and yet if that ouster had taken place more than six years after the adoption became known to her, she would not, under the present ruling, have been able to contest it. This result, it is contended, involved either her bringing a suit at a time[47] when none was necessary, or the hardship that when it did become necessary, it was not allowed.

But the obvious answer to the first part of the argument is that it was not unnecessary for her to sue, for it was necessary for the purpose of completing her title, which, so long as the adoption stood in the way, was a bad one. And the answer to the second part of the argument is that the widow would be in no worse a position than the adopted son, for, if her six years' possession had begun with a denial of his adoption, he would, after the lapse of that time, be equally debarred under the next Article (119) from suing to establish it.

Another case put is that of a reversioner, say a brother, entitled to inherit his divided brother's estate but for an adoption made by the latter. Supposing that adoption to have been made six years before his death, is the brother, it is asked, bound to sue to declare the adoption invalid before his right to inherit accrues, and when if he should happen to predecease his brother, it would never accrue. The answer must be in the affirmative and not unreasonably, for although the litigation may, in a case here and there, turn out to have been in vain, that disadvantage is small compared with the advantage to the community generally in the security of titles, if they are not challenged within a reasonable time. The principle has always been the same. The only difference now is that the time for impeaching an adoption has been changed from twelve years from the date of it absolutely, to six years from the time that it became known to the party ready to dispute it. This is indeed a more favourable starting point for him than the old one.

The only case that could arise of a supposed denial of justice might be the case of a remote reversioner suddenly finding himself in the position of next reversioner but too late to sue. It could be answered to him that it was owing to his want of due diligence to safeguard his rights, while there was yet time.

It is pointed out that to no other status than that of adoption is this six years' rule applicable. That seems to be so; but it is open to the Legislature, I presume, to extend the provision to the cases of marriage and legitimacy, if it so pleased.

The appeal is accordingly dismissed with costs.

1896
Oct. 20.

Full Bench.

20 M. 48 (F.B.).

20 M. 48 (F.B.).

## [48] APPELLATE CIVIL—FULL BENCH.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Shephard, Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

VENKITI NAYAK AND OTHERS (*Defendants*), *Appellants v.* MURUGAPPA CHETTI (*Plaintiff*), *Respondent.**
[2nd and 20th October, 1896.]

*Limitation Act—Act XV of* 1877, *Section* 14—*Cause of like nature—Misjoinder of causes of action—Want of leave under Civil Procedure Code, Section* 44.

In March 1891 the plaintiff sued the defendant to recover the sum of money due on the taking of an account between the plaintiff and the defendant, who was his agent, and to recover possession of certain land. The plaintiff did not obtain leave under Civil Procedure Code, Section 44 for the institution of this suit which was accordingly dismissed for misjoinder of causes of action. The plaintiff now instituted on 5th April 1893 two suits, the one for the money and the other for the land:

*Held*, that the plaintiff was entitled under Limitation Act, Section 14, to have the time occupied in the previous proceedings deducted in the computation of the period of limitation applicable to his suit for money which accordingly was not barred by limitation.

[F., 22 M. 494 =9 M.L.J. 37; 24 M. 361; R., 22 A. 248 (F.B.); 23 M. 583 ; D., 29 B. 219=7 Bom.L.R. 90.]

APPEAL against the order of W. Dumergue, District Judge of Madura, in Appeal Suit No. 200 of 1894, reversing the decree and remanding for trial Original Suit No. 152 of 1893 on the file of the District Munsif of Tirumangalam.

A suit for Rs. 2,315 due on accounts. The plaintiff was a cotton dealer and money lender and had a shop at Sengapadai, which was managed by defendant as his agent from 5th July 1881 to the 11th January 1889, when his agency ceased. Accounts not having been settled between him and plaintiff, on 19th March 1891 the plaintiff sued to recover the sum of money due on the taking of an account, and also to recover with damages two pieces of land said to have been conveyed benami to the defendant as his agent, without obtaining the leave of the Court under Civil Procedure Code, Section 44. The District Munsif, in whose Court the suit was instituted, made an order on the 17th June, in which, after quoting Section 44, he said that the suit was liable to be dismissed, on the ground of misjoinder of causes of action. but that he would give the plaintiff **[49]** an opportunity to amend the plaint and file separate suits in respect of these different causes of action and allowed 7 days for that purpose. No amendment was made, and on the 25th June the District Munsif made an order dismissing the suit which was confirmed on appeal on 24th October 1892. The plaint in the present suit was presented on 5th April 1893.

The District Munsif held that the claim was *res judicata* by reason of the previous order which he said was passed under Section 158 of Civil Procedure Code; he also held that the suit was barred by limitation, the plaintiff not being, in his view, entitled to the deduction under Limitation Act, Section 14, of the time occupied by the previous proceedings and he accordingly dismissed the suit. On appeal the District Judge held that

* Appeal against Order No. 78 of 1894.

there was no bar by *res judicata* and also that the suit was not barred by limitation, as to which he quoted *Narasimma* v. *Muttayan* (1). He accordingly reversed the decree and remanded the suit for trial on the merits.

The defendants preferred this appeal.

*Bhashyam Ayyangar*, for appellants.

*Krishnasami Ayyar*, for respondent.

This appeal coming on for disposal before BEST and SUBRAMANIA AYYAR, JJ., on 3rd May 1895, they made the following order of reference to Full Bench.

## ORDER OF REFERENCE TO FULL BENCH.

We defer our decision in this case pending decision of the Full Bench "of the question whether misjoinder of causes of action is a cause for "which time should be deducted under Section 14 of the Limitation Act."

The case came on for hearing before the Full Bench on 2nd October 1896.

*Bhashyam Ayyangar*, for appellant.

There is a conflict of decisions upon the question referred. The decision appealed against is inconsistent with the judgment in *Tirtha Sami* v. *Seshagiri Pai* (2) where it was held that misjoinder is not a cause of like nature within the meaning of Limitation Act, Section 14, dissenting from the case followed in *Narasimma* v. *Muttayan* (1). That case follows *Deo Prosad Sing* v. *Pertab Kairee* (3) which is approved in *Mullick Kefait Hossein* v. *Sheo Pershad Singh* (4) and dissented from *Jema* v. *Ahmad Ali Khan*(5). **[50]** The leading cases in Bombay are *Bai Jamna* v. *Bai Ichha*(6) and *Krishnaji Lakshman* v. *Vithal Ravji Ranji* (7). The expression cause of a like nature cannot on the right construction be held to include those which are due to the action of the suitor. This is deducible from the cases last cited. See also *Chunder Madhub* v. *Bissessuree Debea* (8), *Rajendro Kishore Singh* v. *Bulaky Mahton* (9) and *Nobin Chunder Kurr* v. *Rojomoye Dossee* (10).

*Krishnasami Ayyar*, for respondent.

Most of the cases quoted in favour of the appellant are really cases of defective jurisdiction. The term jurisdiction being used generally and not restricted to the pecuniary or territorial limits of jurisdiction. In Section 14 the expression " cause of like nature " must include formal defects which render the Court incompetent to entertain the suit. Moreover the subsequent suit must be, in effect, the same suit as the first and the other cases quoted for the appellant proceed on this ground. See also *Mohun Chunder Koondoo* v. *Azeem Gazee Chowkeedar*(11), *Dhan Sing* v. *Basant Sing* (12) and *Subbarau Nayudu* v. *Yagana Pantulu* (13).

The Court (COLLINS, C.J., SHEPHARD, SUBRAMANIA AYYAR and DAVIES, JJ.) delivered judgment as follows :—

## JUDGMENT OF THE FULL BENCH.

In the case which gave rise to this reference, it appears that the former suit was dismissed, because, without leave of the Court, claims in

(1) 13 M. 451. (2) 17 M. 299. (3) 10 C. 86. (4) 23 C. 821.
(5) 12 A. 207. (6) 10 B. 604. (7) 12 B. 625. (8) 6 W.R. 184.
(9) 7 C. 367. (10) 11 C. 264. (11) 12 W.R. 45. (12) 8 C. 519, (527).
(13) 19 M. 90 (95).

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respect of moveable and immoveable property had been united in one plaint in violation of the provisions of Section 44 of the Civil Procedure Code. The real question to be decided is whether the reason for the failure of that suit was of such a character as to entitle the plaintiff in the present suit to take advantage of Section 14 of the Limitation Act. It was argued on behalf of the plaintiff that any misjoinder of causes of action rendering the Court unable to entertain the suit, should be deemed to be "a cause of a like nature" with defect of jurisdiction within the meaning of Section 14. The argument, indeed, was pushed to this length, that any plaintiff, whose plaint had been rejected under Section 53 or 54 of the Civil Procedure Code, might, provided that other conditions were fulfilled, claim to have the time expended on the abortive proceeding deducted in the computation [51] of the period applicable to his new suit. If it had been intended to embrace such a large class of cases within the scope of Section 14, one would have expected correspondingly general words to be used. The phrase "defect of jurisdiction or other cause of a like nature" seems quite inadequate to denote the miscellaneous cases of defect mentioned in Sections 53 and 54. For the purpose of the present case, however, it is unnecessary to deal with the argument of the plaintiff's vakil.

The case was not one in which mere misjoinder of causes of action had proved fatal to the first suit. It was rather the absence of the leave required by Section 44 of the Civil Procedure Code which rendered the Court unable to entertain it. Such a defect as absence of leave was held in a recent case decided in this Court to bring the case within the provisions of Section 14, and we think that case was rightly decided. *Subbarau Nayudu* v. *Yagana Pantulu* (1).

Following that case, we hold that the question, whether such misjoinder as there was in the present instance was a cause for which time should be deducted under Section 14 of the Limitation Act, must be answered in the affirmative.

## FINAL JUDGMENT.

This appeal coming on this day for final hearing, the Court (SUBRAMANIA AYYAR and BODDAM, JJ.) dismissed the appeal.

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**20 M. 51=6 M.L.J. 241.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

PAYYATH NANU MENON (*Plaintiff's Representative*), *Appellant* v. THIRUTHIPALLI RAMAN MENON AND OTHERS (*Defendants*), *Respondents.** [25th August and 15th September, 1896.]

*Malabar Law—Adoption by the Karnavan of a Marumakkatayam tarwad—Want of consent by the rest of the tarwad—Civil Procedure Code, Section 365—Legal representative.*

A tarwad in Malabar subject to Marumakkatayam Law was reduced in number to two persons, *viz.*, the karnavan and his younger brother the plaintiff. [52] They quarrelled and the former without the consent of the latter adopted as members of the tarwad his son and daughter and her childern On his death

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* Appeal No. 38 of 1895.

(1) 19 M. 90.

the plaintiff sued for possession of the tarwad property and for a declaration that the adoptions were invalid: 1896 SEP. 15.

*Held*, that the plaintiff was entitled to the relief asked for.

After an appeal was presented by plaintiff, who had obtained a decree for possession but no other relief, he died leaving a will making certain dispositions of the property to which he was solely entitled on the assumption that the adoptions in question were invalid and his executor was admitted as his legal representative for prosecuting the appeal. APPELLATE CIVIL.

20 M. 51= 6 M.L.J. 241.

APPEAL against the decree of A. Venkatramana Pai, Subordinate Judge of Calicut, in Original Suit No. 39 of 1892.

The facts of the case and the decree of the Subordinate Court are stated sufficiently for the purposes of this report in the judgment of SUBRAMANIA AYYAR, J.

Plaintiff preferred this appeal.

*Krishnasami Ayyar* and *Sundara Ayyar*, for appellant No. 2.

*Bhashyam Ayyangar*, *Sankaran Nayar* and *Sankara Menon*, for respondents Nos. 1, 2, 6 and 7.

*Subramania Sastri*, for respondents Nos. 3, 4 and 5.

## JUDGMENT.

SUBRAMANIA AYYAR, J.—One Govindan Nair and his younger brother Ñanu Menon were, in the year 1892, the only surviving members of a tarwad subject to the Marumakkatayam law. The former, who was the karnavan, adopted on the 21st April of that year four persons, *viz.*, his son Raman the first defendant, and his daughter Lakshmi the second defendant, and her children Paru and Krishnan the sixth and the seventh defendants. He made the adoptions without the express or implied consent of Nanu Menon, who had, prior to the date of the adoptions, been for many years on unfriendly terms with his brother. In June 1892 Govindan Nair died. Subsequently Nanu Menon brought the suit, out of which this appeal arose, for a declaration that the said adoptions were invalid, for possession of the property which had been held and managed by Govindan Nair as the karnavan and for certain minor reliefs. In the Court below, he got a decree for the property, &c., but his prayer as to the adoptions was not granted. He preferred this appeal chiefly against such refusal to declare them to be invalid. After the appeal was presented, he having died leaving a will making certain dispositions of the property to which he was solely entitled if the adoptions in question be found to be invalid, [53] his executor was admitted as the legal representative for prosecuting the appeal.

On the one side, the adoptions were impeached, among other grounds, for the reason that one essential requisite for a valid adoption, *viz.*, the assent of all the members of a tarwad was wanting in this case, inasmuch as Nanu Menon had not consented. On the other side, it was urged that such consent was unnecessary since Govindan Nair, as karnavan, had sole authority in the matter. Without entering into the question whether the consent of all, or only that of the majority of the members of a tarwad is necessary, it is sufficient for the purposes of this case to determine whether the latter contention is sound.

No decision of this Court or of the local Courts directly bearing on that contention was cited.

Nor has any satisfactory evidence been adduced to show that the actual usage of the people is in favour of the view urged on behalf of the defendants. The evidence as to custom, called for them, is that of their

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ninth, tenth and eleventh witnesses. The first of these, the Zamorin of Calicut, was not very consistent in the evidence he gave. At first he stated that the karnavan can adopt without the consent of his anandravan. But later on he qualified this statement by adding that if the anandravan was neither an outcaste nor an insane person, his assent also was necessary. He, however, again, changed his answer and adhered to his original statement. The tenth witness, a Nambudri, was more positive in asserting that an anandravan's consent was unnecessary. The eleventh witness, another Brahman, gave it as his opinion that a karnavan was entitled to adopt, even against the will of the anandravans. But he contradicted himself as to a point intimately connected with that under consideration, *viz.*, the question whether, if a karnavan was opposed to any adoption being made, but the anandravans insisted upon one, whose will should prevail? As to this in his chief examination the witness observed that the adoption should take place in spite of the karnavan's dissent. But in cross-examination he said it should not—a statement which was subsequently retracted. None of the three witnesses was able to speak even to a single instance in which a karnavan did in fact adopt without the consent of his anandravan or anandravans. Without such corroboration, the bare opinions of these witnesses are hardly of much value.

**[54]** Nor does the evidence on the other side throw any light on the question. The documentary evidence, which consists of Exhibits UUU, VVV, WWW, only shows that, in each of the cases to which they relate, all the persons interested in the particular adoption concurred in it. But it would be wrong to accept such inconclusive conduct in so very few cases as evidence of a general consciousness on the part of the people that without the consent of his anandravan a karnavan cannot adopt. As to the oral evidence neither the third nor the tenth witness, relied upon, possesses any special qualifications that would lend weight to their view that the karnavan alone cannot act in the matter.

In the absence, therefore, of judicial decisions or satisfactory proof of custom for or against the defendants' contention, the question has to be dealt with on principle.

But before doing so, it will be convenient to say a few words with reference to an authority, cited as one distinctly in favour of the defendants, *viz.*, paragraph 403 of Mr. Justice Strange's *Manual of Hindu Law*, second edition, published in 1863, which contains the statement that "on failure of the sister's progeny, male and female, the head of "the family may make adoption." If it were clear that, in penning the words just quoted, the learned author had in contemplation a case like the present, his opinion, though unsupported by any other authority than his own, would, having regard to his great experience of the people of Malabar, be entitled to much weight. But in the passage in question, the author merely glances at the general subject of adoption in Marumakkatayam families, and seems to mean nothing more than that when a tarwad finds it necessary to make an adoption, it acts through its chief member—the karnavan. That a question, like the one now under discussion, was present to the mind of the author, there is nothing in the paragraph itself to suggest. Consequently, the passage relied on, cannot be treated as an authority in favour of the view for which it was cited.

How then does the matter stand on principle? No doubt, a karnavan possesses, under the law, large powers with reference to the concerns of his tarwad. He is by birth the head of the family, holds possession of its property, receives the income and distributes the same according to

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his own discretion among those under his protection. And no doubt, in transactions with outsiders as well [55] as in litigation with such persons, he generally represents the family. But it does not follow that he possesses similar independent authority with reference to adoptions into the family. For the powers just above referred to, are obviously all more or less connected with management only; whereas adoption, on the other hand, is an act which clearly falls outside the scope of mere management. Such affiliation involves bringing in strangers into a tarwad and the exercise of the power so to affect its very constitution is *prima facie* not a matter to be entrusted to any one member, however prominent the position he occupies in that body is. Here it may be asked, is not a similar power vested in a father of a Hindu family to whom a karnavan has been compared? (*Vide* in *Eravanni Revivarman* v. *Ittapu Revivarman* (1).) It is true that such a father has full authority to sanction the introduction of a stranger into the family by empowering a widow of one of his sons to make an adoption to her husband. But that exceptional power of the father rests upon a special provision of the Hindu law. So far therefore as the present question goes, there appears to be no analogy between the father and the karnavan. Moreover, considering that, unlike under the Hindu law, a practically unlimited number of persons of both sexes can be adopted under the Marumakkatayam system, it is scarcely necessary to point out that the power in question, if it were exercisable by a karnavan alone, is, should he happen to be an unscrupulous man, capable of being used by him with impunity so as to cause serious detriment to the other members of his tarwad.

In these circumstances, with every desire not to weaken the established authority of a karnavan, one cannot, especially when called upon to lay down almost for the first time a definite rule on the subject, ignore altogether the inexpediency of recognising that a karnavan by himself is entitled to adopt; since that would only add one fresh ground for discord and dissension between a karnavan and those subject to his authority, of which the constant conflict of the former's interest with his duty referred to in *Eravanni Revivarman* v. *Ittapu Revivarman* (1) is a fruitful cause, and which are said to be so rife in many families in different parts of Malabar.

Before concluding this discussion, it remains to notice an argument urged on behalf of defendants, *viz.*, that should it be found [56] that an adoption made by a karnavan was, having regard to all the circumstances of the case, prejudicial to the true interests of the other members of the tarwad, it is open to a Court to cancel the same, as it would cancel a sale of property belonging to the family but improperly alienated by a karnavan without the assent of the other members. It is hardly necessary to say that there is more than one solid distinction between the two classes of cases. In the first place, it cannot be denied that, under certain circumstances, the power to transfer, even by way of sale, is part of the powers of a manager like a karnavan (compare the observations in *Kalliyani* v. *Narayana* (2) whereas, as already pointed out, the power to import strangers into the family by adoption is essentially of a different and higher nature. In the second place, while the Courts, in interfering with an unwarranted transfer of property by a karnavan, exercise a jurisdiction, on the whole beneficial to the family, they would be instruments of doing little but harm if they are also required to set aside adoptions, not on the

(1) 1 M. 153 (157). (2) 9 M. 266 (267).

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ground that they contravene some definite rule of law, such as that relating to the vamsam or tribe of the person to be adopted, but on the ground of the undesirableness of the adoption, the unsuitability of the person or persons selected, or for other like reasons. Surely these are matters for the final decision of the party making the adoption. To leave such questions open for adjudication by Courts cannot but introduce a mischievous element of uncertainty and doubt as to the status of the persons adopted, operate as a premium to vexatious litigation, and, above all, throw upon the tribunals a duty that, from its very nature, they are not in a position to discharge satisfactorily.

It would seem, therefore, that the view that a karnavan, at his sole unfettered discretion, can adopt, finds little or no support even in principle. And as on this ground the adoptions in question fail, it is unnecessary to consider the other reasons urged against their validity.

The only other point to be noticed is the objection taken by the appellant as to the amount of damages awarded in respect of certain materials of a dilapidated building removed and used by the defendants. There is no good reason to think that those **[57]** materials were worth more than the sum granted by the Subordinate Judge.

The decree of the Lower Court will be modified by declaring that the adoptions are invalid, and in other respects it must be confirmed. The respondents will pay the appellant's costs here.

DAVIES, J.—I quite agree in the conclusions of my learned colleague. I would, however, add two additional reasons in support of the view we have taken on general principles, namely, that the karnavan as such has not the sole power to make an adoption.

In the first place, there has been no attempt to prove that a legal or moral obligation is cast on the member or members of a moribund tarwad to make an adoption. On the contrary, the witnesses in the case do not go further than saying it is proper—not that it is obligatory. This is confirmed by the fact that the practice is by no means universal or there would not be the frequent escheats to the State of tarwad property for want of a successor. The making of an adoption then being optional, how can the karnavan, without the consent of his anandravans, forestall them and deprive them of that option which in the nature of things must reside in the last surviving member or members of the tarwad? If they should agree there is an end of the matter, but if they do not agree, the karnavan in acting on his sole authority is arrogating to himself a power of making a final disposition of the family property. The powers of a karnavan are great, but none of the powers so far recognized in him is so large as that now claimed for him. It is tantamount to allowing him to make a gift of the tarwad property, which he cannot ordinarily do.

And in the second place, even if it be obligatory, there is no actual necessity for making the adoption until the tarwad is reduced to a single member. As the occasion for the exercise of the power really arises only then, it would seem to follow that the right, when disputed, must be held necessarily to vest in the last surviving member. The necessity has then become absolute.

20 M. 58 (F.B.) = 6 M.L.J. 281.

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## [58] APPELLATE CIVIL—FULL BENCH.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice. Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

SEENI CHETTIAR (*Defendant No.* 1), *Appellant v.* SANTHANATHAN CHETTIAR AND OTHERS (*Plaintiff and Defendants Nos.* 2 *and* 3), *Respondents.** [25th September and 12th November, 1896.]

*Registration Act—Act III of* 1877, *Sections* 3, 17 (*d*)—*Interest in land—Timber—Lease —Specific Relief Act—Act I of* 1877, *Section* 36—*Injunction.*

The plaintiff (who held on lease a share in a village and in the trees standing in the village tank), in consideration of Rs. 200 and a promissory note for Rs. 3,200, executed in favour of the defendant a document by which he assigned to the latter the right "to cut and enjoy the trees, &c.," for a period of four years from its date. The instrument was not registered. The defendant felled the trees which were mature at the date of the instrument and subsequently felled others since matured. The plaintiff now sued for a declaration of his title to the remaining trees and for an injunction to restrain the defendant from intermeddling therewith, alleging that he had sold to the defendant orally the right to fell only such trees as were then matured :

*Held*, that the unregistered instrument purported to convey an interest in immoveable property, and was not a lease and was inadmissible in evidence ; and that the plaintiff was not entitled to relief by way of injunction or otherwise.

[F., 29 M. 353 ; 15 Ind. Cas. 234 (239) ; R., 13 Bom. L.R. 874 (877) = 12 Ind. Cas. 375 ; 17 C.W.N. 166 = 16 Ind. Cas. 705 (707) ; 1 Ind. Cas. 903 = 5 N.L.R. 21 ; 5 M.L.T. 295 ; D., 28 A. 277 = 3 A.L.J. 138 = A.W.N. (1906) 4.]

APPEAL under Letters Patent, Section 15, against the judgment in second appeal No. 319 of 1894, which was preferred against the decree of F. H. Hamnett, Acting District Judge of Tinnevelly, in appeal suit No. 214 of 1893, confirming (save as to costs) the decree of S. Gopalachariar, Subordinate Judge of Tinnevelly, in original suit No. 12 of 1892.

The plaintiff alleged that he and defendant No. 2 were joint lessees under a lease in the village of Pattampattur and in the trees standing in the village tank, that in October 1890 when there were 3,500 trees fit for felling, defendant No. 2 sold his half share therein to the plaintiff who conveyed them orally to defendant No. 1 in January 1891 for Rs. 200 paid in cash and Rs. 3,200 secured by a promissory note, that defendant No. 1, having felled the trees above referred to, proceeded to fell others since matured, [59] alleging that his rights remained in force during the whole currency of the lease to the plaintiff and defendant No. 2. The plaintiff prayed for a declaration of his right to the trees standing in the tank and for an injunction restraining defendant No. 1 from felling them.

Defendant No. 1 claimed to be in possession and to be entitled to the trees under an instrument executed in his favour by the plaintiff on 1st January 1891. That instrument which was not registered was in the following terms :—

"In respect of the transaction of business heretofore taken on "contract from Madura Pattamars in Fasli 1294 by me and A. N. "Meenakshisundaram Settiar Avergal, I have paid on 16th December 1890 "in current Fasli 1300, value for the said Meenakshisundaram Settiar's "half share, excluding my share, in the karuvela, velvala, morgosa and "manjanatti trees, &c., in Pattambudur tank to the north of the said "village and in the gum (resin) karuvalam nuts, grass, kora, &c., standing

* Letters Patent Appeal No. 73 of 1895.

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"thereon; and been enjoying the same till this day. As I have settled a "value of Rs. 3,400 for the said two shares together with the tank and "bed of the said tank so that you may cut and enjoy the trees, &c., and the "grass, korai, gum, karuvela nut, &c., from this day till the close of Fasli "1304, and executed a yadast to you on receipt of a note from you "promising payment within a period of six months, you will enjoy in the "said tank, as mentioned above. Should there be any trees or other "materials whatever in the said tank on 1st day of the Fasli 1305, the "above said person shall not interfere (with it)."

The Subordinate Judge held that the instrument relied on by the defendant was inadmissible for want of registration on the ground that it dealt with immoveable property and he passed a decree for the plaintiff as prayed with costs. On appeal the District Judge was of opinion that the unregistered instrument could operate only with regard to the trees ready to be felled, at the date when it was executed. He modified the decree appealed against only by directing that each party should bear his own costs.

Defendant No. 1 preferred the above second appeal which came on for hearing before SHEPHARD and BEST, JJ.

*Ramachandra Rau Saheb*, for appellant.

**[60]** *Bhashyam Ayyangar*, *Ramakrishna Ayyar* and *Tiruvenkatachariar*, for respondent No. 1.

*Krishnasami Ayyar*, for respondent No. 3.

SHEPHARD, J.—The first question is whether the yadast tendered in evidence by the defendant is a lease, and, as such, requires registration. The interest acquired by the defendant under the instrument consisted in the right to enjoy the produce of all the trees in the tank bed as also the grass and the reeds, and further to cut and remove the trees for a period exceeding four years. It was not merely the trees and grass then growing and ready to be cut that the defendant was to acquire. He was further to be at liberty to take all the trees which might grow on the ground within the period named. The intention was, in my opinion, to create an interest in immoveable property and certainly it was intended that the defendant should have exclusive enjoyment of the products named in the yadast.

There was, therefore, a lease of immoveable property and not a mere license (see *Sukry Kurdeppa* v. *Goondakull Nagireddi* (1)) and as the enjoyment was given for term exceeding one year, registration of the yadast was compulsory. Failing the evidence which the instrument would afford, the defendants' claim to continue cutting the trees cannot be substantiated. The question, however, remains whether the plaintiff is entitled to relief by way of injunction.

The judgments of the Courts below, while discussing at length the question of law, do not state the facts with sufficient fullness and adequacy. It appears, however, to be found that the plaintiff received from the defendant Rs. 200 in cash and Rs. 3,200 in the shape of a promissory note and that this payment was made in consideration of the plaintiff allowing the defendant to cut the trees and take the other produce for a period of years. It also appears to be found that the defendant was not, at the time of the suit, in actual possession of the ground. The District Judge finds against the plaintiff on his contention that a particular number of trees only were sold to the defendant. He also appears to think that all the timber and grass standing at the date of the yadast had

(1) 6 M.H.C.R. 71.

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been removed. It is not stated explicitly, but I think it may be inferred, that the note for Rs. 3,200 which was produced by [61] the plaintiff has never been liquidated by the defendant. Under these circumstances, the question which I suggested at the hearing does not arise. I mean the question whether the Court should assist by an injunction a plaintiff who, while he has himself received the greater part of the agreed consideration, is endeavouring to prevent the defendant from enjoying that for which he has paid. Seeing that the defendant has actually paid only Rs. 200 and must have had in the shape of timber and other things a sufficient *quid pro quo*, I do not think he has any cause to complain of the injunction. I would dismiss the appeal with costs.

BEST, J.—The yadast on which appellant relies is no doubt an instrument creating an interest in immoveable property for a period of four and a half years extending from its date (1st January 1891) to the close of Fasli 1304 (30th June 1895). It is not merely a license to cut trees and grass in existence on the tank bed at its date, but to "cut and enjoy the trees, &c., and the grass, korai, gum, nuts, &c., from this day till the close of Fasli 1304." It is, therefore, a document that should have been registered and in default of registration, is inadmissible as evidence of any transaction affecting immoveable property. Consequently it would be of no avail to defendant if produced by him in support of a suit for possession of the tank—or for enforcement of his right to take grass, nuts, &c. (see *Sukry Kurdeppa* v. *Goondakull Nagireddi* (1)). Nor would it be admissible as evidence to resist a claim by the plaintiff for possession of the tank. The present suit, however, is not for possession of the tank, but only for a declaration of plaintiff's right to certain standing trees and for an injunction restraining defendant from felling the same. An unregistered document inadmissible as evidence affecting immoveable property is none the less admissible when the question relates only to moveables (see *Thandavan* v. *Valliamma* (2)). Standing timber is moveable property according to the definition given in Section 3 of the Registration Act itself. Consequently, the non-registration of the document in question is no bar to its admissibility for the purposes of this suit. The genuineness of the yadast is found as a fact and the payment by defendant of Rs. 3,400 as consideration is not denied.

[62] The District Judge would no doubt have dismissed the plaintiff's suit, had it not been for his finding that the unregistered yadast could not be considered.

As, in my opinion, the yadast is admissible as evidence for the purposes of this suit, in which no immoveable property is sought to be affected, I would allow this appeal, and setting aside the decrees of the Courts below, dismiss the plaintiff's suit and direct him to pay first defendant's costs throughout.

In consequence of the difference of opinion between their Lordships, the following order was made by Mr. Justice BEST under Section 575 of the Civil Procedure Code.

ORDER.

Under Section 575 of the Code of Civil Procedure Mr. Justice Shephard's judgment prevails and the appeal is dismissed.

Defendant No. 1 appealed as above under the Letters Patent.

*Ramachandra Rau Saheb*, for appellant.

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(1) 6 M.H.C.R. 71.

(2) 15 M. 336.

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*Bhashyam Ayyangar* and *Ramakrishna Aiyar*, for respondent No. 1.
*Seshachariar*, for respondent No. 3.

*Ramachandra Rau Saheb*, for appellant, referred on the question whether the instrument was a lease or not to *Venkatachellam Chetti* v. *Audian* (1), and he contended on the authority of *Sukry Kurdeppa* v. *Goondakull Nagireddi* (2), *Misri Lal* v. *Mozhar Hossain* (3) and *Bansidhar* v. *Sant Lal* (4) that the property dealt with thereby was moveable property. He also contended that the transaction was in the nature of a contract to sell property (5), *Rajah Sahib Prahlad Sen* v. *Baboo Budhu Sing* (6).

He also argued that in any view of the above questions the suit was not maintainable under Specific Relief Act, Section 42, against the defendant who was legally in possession of the trees and finally that the conduct of the plaintiff had been such as to disentitle him to receive relief by way of injunction, which a Court was not bound to grant under Specific Relief Act, Section 56, save in the exercise of a sound discretion.

*Bhashyam Ayyangar*, for respondent, contended that the plaintiff was in possession and that in second appeal the High Court should not interfere with the discretion, which the Lower Courts had **[63]** exercised in granting to the plaintiff the relief by way of injunction. On the construction of the document it is clear that it deals with an interest in immoveable property and consequently it is inadmissible in evidence for want of registration unless it is a lease exempted under the notification of 3rd May 1871. But it is not a lease under the definition in the Indian Act which are based on English decisions of which see *Marshall* v. *Green* (7), moreover the notification is only applicable to leases in which a rent is reserved and in the document now in question no annual rent is reserved.

JUDGMENT.

COLLINS, C.J.—This second appeal No. 319 of 1894 was originally heard before Shephard and Best, JJ., and those learned Judges disagreed in the conclusion they arrived at; and in consequence of BEST, J., having left the Court, the Letters Patent Appeal had to be heard before three other Judges.

The principal point in dispute was whether the yadast, dated 1st January 1891, created an interest in immoveable property, and, if so, whether it could be used as evidence not being registered. The yadast is as follows :—"In respect of the transaction of business heretofore taken on "contract from Madura Pattamars in Fasli 1294 by me and A. N. Mee-"nakshisundaram Settiar Avergal, I have paid, on 16th December 1890 "in current Fasli 1300, value for the said Meenakshisundaram Settiar's "half share, excluding my share, in the karuvela, velvala, margosa and "manjanati trees, &c., in Pattambudur tank to the north of the said village, "and in the gum (resin), karuvela nuts, grass, korai, &c., standing thereon; "and been enjoying the same till this day. As I have settled a value of "Rs. 3,400 for the said two shares, so that you may cut and enjoy the "trees, &c., and the grass, korai, gum, karuvela nut, &c., on bank and the "bed of the said tank from this day till the close of Fasli 1304, and ex-"ecuted a yadast to you on receipt of a note from you promising to pay "within a period of six months, you will enjoy in the said tank, as men-"tioned above. Should there be any trees or other materials whatever in

(1) 3 M. 358. (2) 6 M.H.C R. 71. (3) 13 C. 262.
(4) 10 A. 133. (5) 5 M.L.J. 253. (6) 2 B.L.R. P.C. 111.
(7) L.R. 1, C.P.D. 35.

"the said tank on the first day of Fasli 1305, the above said person shall "not interfere (with it)."

It appears to me that there can be no doubt but that the yadast does convey an interest in immoveable property: the [64] contrary proposition is not arguable. It has long been settled that an agreement for the sale and purchase of growing grass, growing timber or underwood, or growing fruit, not made with a view to their immediate severance and removal from the soil and delivery as chattels to the purchaser, is a contract for the sale of an interest in land. I, therefore, hold that the yadast does convey an interest in immoveable property and is not receivable in evidence being unregistered.

The next question is to what relief (if any) is the plaintiff entitled. For the reasons given by Subramania Ayyar, J., in his judgment, I am of opinion that the plaintiff is not entitled to any relief. I would, therefore, reverse the decree passed in plaintiff's favour and dismiss the suit. The other Judges having decided that each party should pay his own costs throughout, I am not inclined to differ from them on that point.

SUBRAMANIA AYYAR, J.—The first question argued in this case was whether the document, dated the 1st of January 1891, found to have been executed by the plaintiff to the first defendant, was rightly held to be inadmissible in evidence for want of registration.

The determination of the question depends upon the soundness or unsoundness of the contentions urged on behalf of the plaintiff, *viz.*, first, that the transaction evidenced by the said document amounted to a lease of the plaintiff's interest in the tank of the village of Pattambadur mentioned therein for a term of a little more than four years, and secondly, if that contention fails—that the document created in favour of the said defendant an interest in immoveable property of the value of more then one hundred rupees.

First, as to the contention that there was a lease, it is to be observed that, to constitute such a transfer, it is essential that exlcusive possession of the property which is the subject of the transfer, should be intended to be vested in the transferee (Woodfall on Landlord and Tenant, 14th edition, page 129). If the possession is, however, not of that character, the transaction, whatever else it may be, is not a lease. This being clear, we have to see whether the instrument in the present case secured to the defendant any possession, and, if so, exclusive possession.

Neither the language of the instrument nor the nature of the case, in my opinion, supports the view that the plaintiff, who, as [65] the lessee of a sharer of the village, had joint possession of the tank, divested himself of such possession and transferred it to the first defendant under the document.

The term "lease" does not occur in the instrument at all. Nor is anything stated therein which, in the slightest degree, suggests that the plaintiff's right to the possession of the tank was in any way to be affected by the instrument. Again, the tank being a work of irrigation attached to the village, it cannot be supposed that the plaintiff, in entering into the contract with reference to the trees, &c., growing or likely to grow upon the bed or the embankment of the tank, agreed that, during the period mentioned in the document, the tank was not to be enjoyed, either by himself or by others entitled thereto, as a reservoir for the water required by them for the irrigation of their lands, or that such parties should not be at liberty to use the tank in any other way in which they were entitled to use it, provided their action did not injuriously affect the

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special rights conferred upon the first defendant with respect to the trees, &c., already referred to. It follows, therefore, that the plaintiff did not part with such possession of the tank as he had and that the first defendant obtained merely a right of access to the place for the reasonable enjoyment of what he was entitled to under the contract. Further, even if by a stretch of language the first defendant were to be considered to have acquired a right to some sort of possession of the tank bed, it is quite clear that such right was not exclusive, or, in the language of Lord Hatherley, it was not unattended by a simultaneous right of any other person in respect of the same subject matter *Cory* v. *Bristow* (1).

My conclusion, therefore, is that the transaction was not a lease.

As to the second contention, it is scarcely necessary to observe that though standing timber is, under the Registration Act III of 1877, moveable property only, still parties entering into a contract with reference to such timber may expressly or by implication agree that the transferee of the timber shall enjoy, for a long or short period, some distinct benefit to arise out of the land on which the timber grows. In a case like that, the contract would undoubtedly be not one in respect of mere moveables, but would **[66]** operate as a transfer of an interest in immoveable property. Therefore, the point is whether the contract in question falls under the latter description. Taking all the provisions of the document together, I think there was here more than a sale of mere standing timber and that, in the words of Sir Edward Vaughan Williams quoted with approval in *Marshall* v. *Green* (2) cited for the plaintiff, "it was contemplated that the " purchaser should derive a benefit from the further growth of the thing " sold, from further vegetation and from the nutriment to be afforded by " the land." The fact that the comparatively long period of a little more than four years was granted to the defendant for cutting and removing the trees is, to my mind, strongly in favour of the above view.

I am, therefore, of opinion that the document in question did create an interest in immoveable property, as urged on behalf of the plaintiff, and, being unregistered, it was rightly rejected.

The next question is whether the plaintiff is entitled to any relief. As to the injunction which is the more important of the reliefs claimed by him, I think he is not entitled to it for several reasons. According to *Castelli* v. *Cook* (3) " a party who seeks such relief is bound to tell the " Court what the case is on which he relies; and when he brings forward " prominently, and relies upon a given case, the Court will not allow him, " if he should fail in that case, to spell out another and say he might have " framed his case so as to show a title to the relief asked." In the present instance, the plaintiff came into Court alleging that the contract between him and the first defendant, the terms of which the latter was said to be violating, was for the sale of a specific number of trees, to be cut and removed within six months, from the date of the contract. This allegation has been established to be untrue, and yet the plaintiff seeks now to rest his prayer for the injunction on a ground absolutely ignored in the plaint, namely, the invalidity of the totally different contract set up by the defendant, which the plaintiff denied but which has been found to be true. The case last cited seems to me to prohibit relief being granted on such a change of ground. Moreover, the state of things, from which the plaintiff asks the Court to extricate him, is the direct outcome of the fact that the document was not registered; and as the plaintiff **[67]** himself,

(1) L.R. 2 App. Cases 262, 276. (2) L.R. 1 C.P.D. 35. (3) 7 Hare. 89, 99.

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equally with the first defendant, is responsible for it, the former cannot complain if the Court declines to assist him on the principle laid down by Lord Eldon in *Rundel* v. *Murray* (1), *viz.*, a Court frequently refuses an injunction, where it acknowledges a right, when the conduct of the party complaining has led to the state of things that occasions the application. For another reason also the case is one which falls under the comprehensive rule embodied in Clause J of Section 56 of the Specific Relief Act. That rule rests on the maxim that he who seeks equity must do equity and implies that a plaintiff seeking an injunction must come with clean hands. With reference to this point, it is laid down in Kerr on Injunctions, on the authority of the case therein cited, that a plaintiff, who asks for an injunction, must be able to satisfy the Court that his own acts and dealings in the matter have been fair and honest and free from any taint of fraud or illegality, and that if, in his dealings with the person against whom he seeks relief or with third parties, he has acted in an unfair or inequitable manner, he cannot have relief (3rd edition, page 16).

Now turning to the facts here, according to the contract Rs. 3,400 was payable not merely for the trees already taken away by the first defendant, but also for a considerable number still on the ground as well as any others that may grow during the remaining period of the contract. As the defendant cannot now enjoy the full benefit of the agreement, it is not just that he should have to pay the whole of the consideration. The plaintiff, who, in addition to Rs. 200 paid in cash, had received a promissory note for Rs. 3,200, has not offered unconditionally or on terms to return the note to the first defendant. On the contrary, he has throughout maintained that he has a right to the entire amount. There is nothing to prevent his suing the first defendant upon the note. What amount, if any, the plaintiff might recover in that suit, it is not now possible to say. However that litigation may end, it is quite clear that the plaintiff has it in his power to harass the first defendant by suing him for the whole amount. In these circumstances, the plaintiff's conduct seems to be unfair and inequitable within the meaning of the authorities on the point. Whilst refusing an injunction on the above ground, it would not be a sound exercise of the discretion, vested in the Court under Section 42 **[68]** of the Specific Relief Act, to grant the plaintiff the other relief claimed, *viz.*, declaration of his right to the trees.

I would, therefore, allow the appeal, reverse the decree passed in favour of the plaintiff and dismiss the suit, each party being made to pay his cost throughout.

DAVIES, J.—I entirely concur.

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(1) Jacob 311 (316).

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## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

PANCHENA MANCHU NAYAR AND OTHERS (*Defendants Nos.* 2 *to* 6), *Petitioners v.* GADINHARE KUMARANCHATH PADMANABHAN NAYYAR (*Plaintiff*), *Respondent.**
[16th December, 1896.]

*Companies Act—Act VI of* 1882, *Section* 4—*Unregistered association for gain—Illegal contract.*

The prize winners in a lottery in which more than twenty persons took tickets covenanted with the promoters of the lottery to continue their subscriptions in respect of the successful ticket for two more years in accordance with the arrangement under which the lottery was established. The money not having been paid the promoters brought a suit on the covenant :

*Held*, that there was no association of twenty persons for the purpose of gain or at all, and consequently, that the plaintiffs were not precluded from suing for want of registration under Companies Act, Section 4.

[**Ap.**, 29 M. 477 (**F.B.**)=16 M.L.J. 385=1 M.L.T. 237 ; 2 M.L.T. 52 ; **R.**, 16 Ind. Cas. 686 (687)=(1912) M.W.N. 1235 ; **D.**, 11 M.L.J. 130 ; 1 M.L.T. 106.]

PETITIONS under Small Cause Courts Act, Section 25, praying the High Court to revise the proceedings of E. K. Krishnan, Subordinate Judge of South Malabar, in Small Cause Suit No. 1072 of 1895.

The Subordinate Judge described the suit as " a suit to recover " Rs. 119-3-6, principal and interest due on a kuri scheme in which defend- " ant No. 1, and her deceased son, Sankaran Nayar, held three-fourths of " a ticket." The defence was based on Companies Act, 1882, Section 4, and it was pleaded that the suit was not maintainable because the claim arose out of a numerous association for **[69]** gain which had not been registered. The so-called kuri scheme was embodied in the document (Exhibit I), which was translated as follows :—

"Programme of lottery drawn up on 15th Edavam 1064 (27th May " 1889). We, Puliakkot Devaki Amma's sons, Kunhikrishnan Nayar and " younger brother Panku Nayar of Peruvemba Amsom and Desam in " Palghaut taluk, do hereby start a kuri (lottery) with the following " terms :—The lottery shall be to the total value of Rs. 325, and shall consist " of thirteen tickets each worth Rs. 25. The tickets shall be drawn twice " a year, *i.e.*, on 15th Edavam and 15th Vrischigam. The amount for " the first drawing, *i.e.*, the proprietor's lot, shall be collected and taken by " proprietors on 15th Edavam current. The lottery shall come to a close " on 15th Vrischigam 1070. All the members that have come in for lots, " shall be prepared to pay the amount due by them at 12 o'clock noon on " the day of each drawing at the proprietor's house. The amount so " brought in shall be received by the proprietors, and a receipt written in " the hand of Panku Nayar, executant No. 1, and signed by Kunhikrishnan " Nayar, executant No. 2, shall be granted to each member who pays money. " If any member fails to pay the amount due by him on the date of " drawing, he shall pay a penalty of 8 annas a day for those days, for " which the sum remains unpaid. In the receipt granted for the first " time the amounts paid at subsequent drawings shall be credited as having " been received for respective drawings. The tickets shall be drawn

* Civil Revision Petition No. 196 of 1896.

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"before 4 P.M. on the day fixed therefor. From the amount due to the "winner of the prize at a drawing, Rs. 25 shall be taken off, and the remainder alone paid to the winner. This sum of Rs. 25 shall be distributed in "equal shares among the non-winners of prizes towards the interest on the "amount paid by them. This system of reserving and distributing Rs. 25 "shall continue till the last drawing but one. The winners of prizes shall "give the proprietors such amount of security as may be required by "proprietors for the money which has yet to be paid by them. If the "winners fail to pay at subsequent drawings the amount due by them in "time, they shall, without any consideration of the term, pay the whole "amount remaining unpaid by them with interest at 2 per cent. per "mensem. If, before winning the prize, any member remits money regu-"larly at some drawings but fails to pay at some others, the proprietors "[70] shall either by themselves or by admitting some others, conduct the "lottery, and pay the whole amount to the winner at the time of drawing, "and to the defaulter only the amount he has already paid, and that too "without interest and after the termination of the lottery. If, after obtain-"ing security from the winners, the proprietors fail to pay them the amount "due, they shall pay it with interest at the rate mentioned above. The "proprietors shall insert to this programme an account of the money "collected by them from the date of first drawing, *i. e.*, proprietor's lot to "the last one, and shall also insert in a schedule subjoined hereto, the "names of members who have come in for lots, with number and "amount of tickets purchased by them. Giving their assent to these "stipulations, all the members have subscribed to, and signed in, this."

The first schedule to this document gave the names of twenty-seven persons therein described as members and stated that each had purchased either one ticket or a fraction of a ticket as therein specified. The whole amounted to thirteen tickets of Rs. 25 each. The other schedules were lists of the amounts received and credited for interest as the result of seven drawings of which the last was dated 15th Edavam 1067.

The first defendant and her son executed a document filed as Exhibit A, which bore date 26th May 1891, and was translated as follows:—

"Deed executed jointly by Punchena Chimmu Amma's daughter "Narayani Amma, and son Sankaran Nayar of Peruvemba Amsom and "Desom in Palghaut taluk, to Cheria Puliakkottu Kunhi Krishnan "Nayar, and younger brother Panku Nayar jointly, of the said amsom "and desom. Whereas in the lottery in which interest is distributed "among non-winners for the total value of Rs. 325 started by you as "proprietors on 15th Edavam 1064 (27th May 1889) with thirteen tick-"ets in all including the proprietor's lot, each ticket being worth Rs. 25, "and the lots having been arranged to be drawn twice a year, we have gone "in for three-fourths of a lot and having won the prize at the fourth draw-"ing including the proprietor's lot which took place on 16th Vrischigam "1066 (November 1890), we do hereby acknowledge receipt of Rs. 225 "(two hundred and twenty five rupees) due to us exclusive of interest, "in accordance with the terms of the lottery, and agree to pay "regularly at future [71] drawings, in accordance with the said terms "the sum of Rupees 168-12-0 (one hundred and sixty-eight rupees "and twelve annas), obtaining receipt therefor on the back of this docu-"ment. Should we fail at any drawing to remit the amount in time, we "hereby agree to pay in a lump the whole amount which may remain un-"remitted by us, with interest at 2½ per cent. per mensem from the day "on which default is made by us. Written on 14th Edavam 1066 (26th

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"May 1891) in the hand-writing of Pekkanchath Sekharan Nayar of "Peruvemba Amsom and Desom in presence of the undersigned witnesses."

The Subordinate Judge overruled a plea based on the want of registration under Companies Act, 1882, Section 4, and held that the sum claimed was due by the first defendant on the footing of the above arrangement, and that it was a family debt for which the other defendants were liable as members of the tarwad, and passed a decree as prayed.

Some of the defendants preferred this petition.

*Narayanan Nambiar*, for petitioners.

*Sundara Ayyar*, for respondent.

JUDGMENT.—

From the instances which have come before this Court since *Ramasami Bhagavathar* v. *Nagendrayyan* (1) was decided, it would seem that a notion is coming to be entertained that every chit or kuri in which more than twenty persons are concerned falls within Section 4 of the Indian Companies Act and, therefore, if unregistered, is illegal. It is scarcely necessary to point out that whether an undertaking which generally goes by the name of chit or kuri falls within the said section, depends, of course, not upon the mere name given to the undertaking, but on the existence of the essential characteristics required by that provision of the law. Whether these requirements are present must be ascertained in each case. In the present instance the Subordinate Judge has paid attention to this matter. He has taken evidence as to it and has come to the conclusion that the case is not governed by the above-mentioned Section 4 and is distinguishable from *Ramasami Bhagavathar* v. *Nagendrayyan* (1).

The question is whether the Subordinate Judge's view is correct upon the facts established by the evidence. Now, in cases like the present, to warrant the application of the section in **[72]** question, the first point to be made out is that there is a 'company' or 'partnership' or 'association' consisting of more than twenty persons. It cannot be pretended that there is here either a 'company' or a 'partnership.' Is there then an 'association' of more than twenty persons within the meaning of the Act? The answer to this question depends upon the signification to be attached to the word 'association' in the section. This and certain other points as to the construction of the corresponding section of the English statute, the words of which are identical with those of the section of the Indian Act, underwent elaborate consideration in *Smith* v. *Anderson* (2). There James, Brett and Cotton, L.JJ., differed from the construction put upon the section by Jessel, M.R.

For our present purpose it is enough to quote a couple of passages from the judgments of Brett and Cotton, L.JJ., which deal with the interpretation of the term 'association.' The former observed:—"In order "to come within this clause, there must be a joint relation of more than "twenty persons for a common purpose . . . . I confess I have some diffi-"culty in seeing how there could be an association for the purpose of carry-"ing on a business which would be neither a company nor a partnership, "but I should hesitate to say that, by the ingenuity of men of business, there "might not some day be formed a relation among twenty persons which, "without being strictly either a company or a partnership, might yet be "an association. But according to all ordinary rules of construction, if

(1) 19 M. 31. (2) L.R. 15 Ch. D. 247.

"the association mentioned in Section 4 is not, strictly speaking, a com- 1896
"pany or a partnership, it must be something of a similar kind. It must DEC. 16.
"be a relation established between twenty persons or more 'for the
"purpose of carrying on business,' *i.e.*, in order that such company, asso- APPEL-
"ciation, or partnership may carry on the business. The business, LATE
"therefore, whatever the word 'business' may mean is to be carried on CIVIL.
"by those twenty persons or more." Cotton, L.J., used the following
language :—"I do not think it very material to consider how far the word 20 M. 68=
"'association' differs from company or partnership, but I think we may 7 M.L.J. 26.
"say that if 'association' is intended to denote something different from
"a company or partnership, it must be judged by its two companions
"between which it stands, and it [73] must denote something where the
"associates are in the nature of partners."

Clearly, therefore, to constitute an association, within the meaning of the section, the existence of a legal relation between more than twenty persons giving rise to joint rights or obligations or mutual rights and duties is absolutely necessary. Otherwise there would be a mere conglomeration of persons as Cotton, L.J., put it, but not an 'association.'

Turning now to the facts of the present case it is perfectly plain from Exhibit I, which sets forth the terms on which the kuri is carried on, that no such relation exists between the various persons who have executed the document. The contracting parties are on the one hand, Kunhi Krishna Nayar and Panku Nayar, who organised the kuri, and who are called the proprietors in Exhibit I, and on the other, each of the remaining ticket-holders individually. The right to collect the subscriptions due periodically by each ticket-holder rests only with the two organisers. The duty of paying the amount collected to the person entitled is cast upon them. It is to them that unlike in the case of *Ramasami Bhagavathar* v. *Nagendrayyan*, (1) the particular ticket-holder who, as the prize winner, has received the periodical collection, has to give the necessary securities for the payment of the future instalments due by him. Further, if any ticket-holder commits any default in paying his subscriptions according to the instalments, the proprietors alone are responsible to make up the deficiency caused by such default and are, consequently, at liberty to admit at their discretion persons not mentioned in Exhibit I as ticket-holders in lieu of the defaulters. The only obligation each ticket-holder lies under, is to pay his subscription from time to time to the proprietors; and the only right possessed by him is to get from them his several share of the Rs. 25 deducted at the drawing of each lot out of the total collections and distributed among the ticket-holders other than those who have received prizes and also to receive from the same parties the amount of the prize when he in his turn becomes the prize winner. It is thus manifest that the only persons associated with each other in the sense of possessing joint rights or being subject to joint obligations or of having mutual rights and duties are the two proprietors, whilst the other ticket-holders are [74] in the "language of James, L.J., "from the first entire strangers who have entered into no contract whatever with each other."*

It follows therefore that the very first condition laid down by the section relied on is wanting here.

In arriving at the above conclusion, we have not overlooked the observation made in one of the cases cited, to the effect that no hypercritical attempt should be made to withdraw from the operation of the

(1) 19 M. 31. * 15 Ch. D. at p. 274—ED.

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legislative provision in question any case which reasonably falls within its purview. This is no doubt true. On the other hand, it is to be borne in mind that the enactment was intended, as stated by James, L.J., "to "prevent the mischief arising from large trading undertakings being "carried on by large fluctuating bodies, so that persons dealing with them "did not know with whom they were contracting, and so might be put to "great difficulty and expense, which was a public mischief to be repressed." When an Act framed with such intention is sought to be availed of for getting rid of obligations incurred in connection with comparatively small undertakings like the present, carried on on the responsibility of a very few known individuals and resorted to by ticket-holders from prudential motives as a means of effecting some savings from their petty incomes, it is the duty of the Courts to guard against the extension of the statute, from an undue zeal for carrying out the policy of the enactment, to cases clearly not within its meaning.

Being satisfied, as already stated, that here the very first requisite under the section has failed, it is unnecessary to consider the other question which was argued at length, *viz.*, assuming that the ticket-holders and the proprietors do constitute together an association of the kind contemplated by the section, whether the association can be said to have been formed for the purpose of carrying on business, having for its object the acquisition of gain.

We agree, therefore, with the Subordinate Judge's conclusion and dismiss the petition with costs.

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20 M. 75.

## [75] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.*

CHENGAMA NAYUDU (*Plaintiff*), *Appellant v.* MUNISAMI NAYUDU AND OTHERS (*Defendants*), *Respondents.**
[12th and 20th November, 1896.]

*Hindu law—Partition—Subsequent acquisitions—After-born son—Right to partition.*

A Hindu having two sons divided his property between them, reserving no share for himself. A third son was subsequently born who now sued for a partition of the property which had been divided and other property subsequently acquired by his brothers by means of its proceeds:

*Held*, that the plaintiff was entitled to the relief claimed.

**[R., 33 B. 267=10 Bom. L. R. 778 ; Expl., 23 B. 636.]**

SECOND appeal against the decree of M. B. Sundara Rau, Subordinate Judge of North Arcot, in appeal suit No. 113 of 1893, confirming the decree of T. Swami Ayyar, District Munsif of Chittore, in original suit No. 337 of 1892.

The plaintiff sued for partition of certain property as the ancestral estate and property acquired with profits derived from the ancestral estate of the family, of which the plaintiff and his brothers, defendants Nos. 1 and 2, were the members. Defendant No. 3 was alleged to be a stranger in possession of part of the property of which partition was sought.

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* Second Appeal No. 880 of 1895.

The first defendant pleaded that his share of the ancestral property had been separated and delivered to him many years before suit, and that part of the property now in question had been acquired by him since that date. Defendant No. 3 claimed to be an illatom member of the family, and raised other pleas similar to those of defendant No. 1.

The Subordinate Judge found that the third defendant was a member of the family as he claimed to be; that there had been partition of the family property before the plaintiff was born; that in 1891 when the plaintiff was an infant, the partition was re-adjusted under an instrument executed by the adult members of the family. He also found that at the time of the original partition the father had reserved no share for himself. The [76] Subordinate Judge, upon these findings confirmed the decree of the District Munsif, under which the plaintiff obtained a one-third share of the lands originally divided between defendants Nos. 1 and 2, but not in the subsequent acquisitions. He said:—"The acquisitions could not be considered as self-acquired if there was no previous division. There having been already a division, subsequent acquisition made by their profits must be held to be the acquirer's separate properties in ordinary circumstances. Here, we have a case of an after-born son. The father reserved no share for himself and the whole property was distributed among the sons in existence at the time of partition. There is no contention that the father had any subsequent acquisitions. In such a case Yagnavalkya says, that the posthumous son, whose mother's pregnancy was not manifest at the time of partition, must receive, out of his brothers' allotments, a share equal to their shares after computing the income which has accrued and the father's debts that have been discharged.

"Mitakshara, Chapter I, Section VI, paragraph 8, ordains that in such case the allotments must be made out of the visible estate, and paragraph 9 explains the meaning of the visible estate by saying 'Received by the brethren.' From this it is evident that the Mitakshara contemplates a share to be allotted out of the shares previously allotted, but not out of acquisitions subsequently made by the brethren.

"I think, therefore, that the finding of the Lower Court in regard to plaintiff's share out of the shares allotted to first and second defendants is not open to question."

The plaintiff preferred this second appeal.

*Sriranga Chariar*, for appellant.

*Jumbulinga Mudaliar*, for respondents.

## JUDGMENT.

There was a partition between the appellant's brothers, the first and second respondents, and their deceased father before the appellant was born. At that partition the father reserved no property to himself. The Lower Courts have held that the appellant is entitled to a share out of the property taken by the said respondents at the partition. The appellant was, however, not allowed a share out of certain other items of property in the hands of his brothers. These were excluded from the partition decreed to the appellant, not because they were the separate property of the parties in possession, having been acquired by [77] them without the aid of the ancestral estate, but, as we understand the Subordinate Judge, simply on the ground that acquisitions after the partition, even though made with the aid of the property obtained at the partition, belong solely to the acquirer. This view is clearly not supported by the authorities, to

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some of which the Subordinate Judge himself refers. The word 'income' or 'profit' in Yagnyavalkya's text "The visible estate corrected for income or expenditure" (as translated by Colebrooke) (1) or "the visible estate corrected by profit or loss" (as rendered by Mandlik) (2) on which the Mitakshara in Chapter 1, Section VI, 8 and 9, bases its conclusion on this point, undoubtedly includes accretions made to the shares taken on partition and gives to the after-born son a right to obtain his allotment out of the subsequent additions also, provided, of course, they are shown not to have been acquired without the aid of ancestral property. The principle of the rule as pointed out by Subodhini when commenting on Mitakshara, Chapter I, Section VI, 9, cited above, is that so far as the after-born co-parcener is concerned, the individual shares taken by the parties who made the division prior to his birth are as much patrimony after the division as before it and consequently he, the after-born son, is entitled to participate in the gain arising out of such patrimony (1).

The appellant is thus entitled to his share also out of the properties in the hands of the first and second respondents in respect of which his claim was rejected by the Lower Courts. The decree passed by them must, therefore, be modified accordingly. The said respondents will pay the appellant's costs disallowed in the Lower Court as well as his costs in this second appeal. But as against the third respondent the appeal is dismissed with costs.

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20 M. 78.

## [78] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

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ANNA PILLAI (*Petitioner*), *Appellant v.* THANGATHAMMAL (*Counter-Petitioner*), *Respondent.** [27th November, 1896.]

*Transfer of Property Act—Act* IV *of* 1882, *Sections* 88, 99—*Form of decree.*

In November 1882 a decree was passed on a hypothecation bond for the payment of the secured debt and it contained the following words:—"the property hypothecated in the bond being also held liable for the whole amount thus awarded:"

*Held*, that the decree was in reality a decree for sale and could be executed as such.

[R., 2 O. C. 338.]

APPEAL against the order of P. Narayanasami Ayyar, Subordinate Judge of Negaptam, on civil miscellaneous petition No. 606 of 1895, which was an application for the dismissal of a petition for execution preferred by the decree-holder in original suit No. 32 of 1882.

The decree in question was in the following terms:—

"Claim for the recovery of Rs. 5,679-11-0 due under the bond A
" executed to the plaintiff by the first and second defendants and
" Amirthanatham Pillai, the deceased father of the third, fourth and fifth
" defendants, hypothecating the immoveable property specified in the bond
" on the 25th September 1877, the principal being repayable on the 25th
" September 1881 and the interest once a year.

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* Appeal against Order No. 61 of 1896.

(1) Stoke's Hindu Law Books, p. 395. (2) Mandlik's Hindu Law, p. 216.

"This cause coming on on the 15th November 1882 for final disposal "before M. R. Ry. R. Vasudeva Rau Avergal, Subordinate Judge in the "presence of Mr. G.T. Oliver, vakil on the part of the plaintiff, and of A. "Kannoosami Pillai, vakil on the part of the defendants, this Court doth "order and decree that plaintiff do get from first and second defendants "the sum sued for with costs and further interest at 6 per cent. per "annum until payment on the principal from the date of the suit and "on the costs from the present date, the property hypothecated in the "bond A being also held liable for the whole amount thus awarded, "and the Court doth further order and decree that the defendants do "bear their costs."

[79] The decree-holder objected that the boundaries of the land in question were not sufficiently specified either in the decree or in the mortgage, and that the decree, not having been made in accordance with the Transfer of Property Act, gave the decree-holder no right to have the property sold and could not be executed.

The Subordinate Judge dismissed the application and permitted execution to proceed.

The petitioner preferred this appeal.

The memorandum of appeal comprised, among others, the following paragraphs :—

"The suit having been brought after the coming into operation of the "Transfer of Property Act, the decree herein in the form in which it has "been passed cannot be executed by attachment and sale of the mort- "gaged properties.

"Under Section 99 of the Transfer of Property Act the property "cannot be sold, unless the suit had been brought under Section 67 and "the decree be passed under Section 88 of the Act."

*Tiagaraja Ayyar*, for appellant.

Respondent did not appear.

## JUDGMENT.

The decree was not so formal as it should have been under the Transfer of Property Act. This is no doubt due to the fact that that Act had only just come into force at the time when the decree was passed. The decree is in reality a decree for sale. There is nothing to show that the property to be sold is not liable to the debt.

The appeal is dismissed under Section 551, Code of Civil Procedure.

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**20 M. 79=7 M.L.J. 16=1 Weir 188.**

## APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

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QUEEN-EMPRESS *v.* NANJUNDA RAU.* [29th October, 1896.]

*Penal Code, Section 211—False charge of dacoity made to a police station-house officer.*

A false charge of dacoity was made to a Police Station-house officer, who, after some investigation, referred it to the magistrate as false, and the magistrate [80] ordered the charge to be dismissed without taking any action against the parties implicated. The person who preferred the charge was now tried under Penal Code, Section 211, and was found to have acted with the intent and

* Criminal appeal No. 384 of 1896.

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APPELLATE CRIMINAL.

20 M. 79 = 7 M.L.J. 16 = 1 Weir 188.

the knowledge therein mentioned, and he was convicted and sentenced to four years' rigorous imprisonment:

*Held*, that the prisoner had instituted criminal proceedings within the meaning of that section, and that the conviction and sentence were in accordance with law.

[R., 31 M. 506=9 Cr. L.J. 77=18 M.L.J. 573; 4 Cr. L J. 240=2 N.L.R. 119 (120).]

APPEAL against the conviction and sentence of T. M. Horsfall, Acting Sessions Judge of Bellary, in Session Case No. 57 of 1896.

The accused was convicted of having made a false charge against the complainant with intent to injure him and was sentenced to four years' rigorous inprisonment under Section 211, Indian Penal Code. The charge in question was one of dacoity, and it was made to the Police Station-house officer of Bellary. That officer being of opinion, after some investigation, that the charge was unsupported, referred it as false, and the case was struck off the police file. The Sessions Judge and assessors were of opinion that the charge was substantiated and the prisoner was sentenced as above.

The prisoner preferred this appeal.

Mr. *Smith* and *Venkatarama Sarma*, for appellant.

The Public Prosecutor (Mr. *Powell*), for the Crown.

## JUDGMENT.

The appellant was convicted of having made to the police a false charge of dacoity against certain persons and was sentenced under Section 211, Indian Penâl Code, to suffer four years' rigorous imprisonment.

In appeal it is urged that though the charge to the police may have been false, yet, as they referred the charge to the magistrate as false, and as the magistrate ordered the charge to be dismissed as false without taking any action against the accused, there was no 'institution of criminal proceedings' within the meaning of Section 211, and the offence was therefore only punishable with a maximum of two years' imprisonment under the first part of the section, instead of with seven years' imprisonment under the second part of the section.

In support of this view the rulings of the Allahabad High Court in *Empress of India* v. *Pitam Rai* (1) and *Queen-Empress* v. *Bishesha* (2) and *Queen-Empress* v. *Karim Buksh* (3) were relied **[81]** upon. These cases no doubt support the construction of the section for which the appellant contends, but that construction was considered and dissented from by a Full Bench of five Judges of the Calcutta High Court in the case of *Karim Buksh* v. *Queen-Empress* (4), when they followed a long series of earlier rulings of the same Court. We think that the view taken in the latter case is correct. We are unable to find any warrant for holding that the words 'the institution of criminal proceedings' should be limited to the bringing of a charge before the magistrate, or to action by the magistrate or police against the person charged. It seems to us that when, as in this case, a charge of a cognizable offence is made to the police against a specified person, criminal proceedings within the meaning of the section have been instituted just as much as if the charge had been made before the magistrate. It is argued that, when a charge is preferred to the police, it merely sets them on enquiry, and they may find the charge to be false and refuse to proceed with the charge without the accused being even aware that any complaint has been made against him; but precisely the

(1) 5 A. 215. (2) 16 A. 124. (3) 14 C. 633. (4) 17 C. 574.

same may be the case when a complaint is made to a magistrate. He is not bound to take any action against the person accused. He may refer the charge to the police for enquiry, and on receipt of their report may refuse to proceed or take any action against the accused person. In such a case the accused might be unaware that any complaint had ever been made, yet it could hardly be contended that the complaint to the magistrate did not amount to 'the institutiou of criminal proceedings' within the meaning of the section.

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We are of opinion, as already stated, that the true construction of the section is that laid down by the Calcutta High Court in the case we have referred to. Adopting that construction we find that the offence of the appellant in the case before us falls under the latter part of Section 211, Indian Penal Code, and the sentence is not illegal.

Looking to the gravity of the offence charged and the malice of the complainant, we certainly do not consider the sentence excessive. We confirm it and dismiss this appeal.

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**20 M. 82 = 6 M.L.J. 229.**

## [82] APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

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KUPPU NAYUDU (*Defendant*), *Appellant v.* VENKATAKRISHNA REDDI (*Plaintiff*), *Respondent.**
[8th and 29th September, 1896.]

*Civil Procedure Code, Section 43—Transfer of Property Act, Section 85—Ejectment suit by a mortgagor's vendee against the purchaser under a mortgage decree—Subsequent suit to redeem.*

Certain land mortgaged to A was sold to B. A brought a suit on his mortgage without joining B as a party, obtained a decree for sale and became the purchaser under the decree. B then sued to eject him praying for a declaration that the sale was not binding on him. The suit having been dismissed, he now sued to redeem :

*Held* that the suit was not barred under Civil Procedure Code, Section 43, and the plaintiff was entitled to redeem.

SECOND appeal against the decree of S. Russel, District Judge of Chingleput, in appeal suit No. 245 of 1894, affirming the decree of T. A. Krishnasami Ayyar, District Munsif of Chingleput, in original suit No. 114 of 1893.

The plaintiff sued to redeem certain land which had been conveyed to him on 12th August 1884, and placed in his possession. In original suit No. 859 of 1884 the present defendant, being mortgagee under an instrument, executed by the father of plaintiff's vendor sued to enforce his mortgage, obtained a decree for sale without joining the present plaintiff as a party, and purchased the land at the Court sale. In original suit No. 259 of 1888 the plaintiff sued to eject the defendant; but the suit was dismissed on the ground that his remedy, if any, was by a suit for redemption. It was now contended, *inter alia*, that the plaintiff was precluded from maintaining this suit under Civil Procedure Code, Section 43. This objection was overruled by the District Munsif who passed a decree as prayed, which was confirmed by the District Judge on appeal.

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* Second Appeal No. 1777 of 1895.

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APPELLATE CIVIL.

20 M. 82= 6 M.L.J. 229.

Defendant preferred this second appeal.

*Pattabhirama Ayyar* and *Narayana Ayyangar*, for appellant.

Mr. *Krishnan*, for respondent.

JUDGMENT.

[83] The first ground of appeal urged is that the suit is not sustainable with regard to Section 43, Civil Procedure Code, and we are referred to the decision of this Court in *Muthunarayana Reddi* v. *Rayalu Reddi* (1). The case referred to is not in point, for there the plaintiff in his first suit ignored the existence of the defendant's mortgage and falsely alleging that the defendant was a trespasser sued to eject him as such. In the present case, the plaintiff in his earlier suit (original suit No. 259 of 1888) did not ignore the defendant's earlier mortgage. On the contrary he recited it and the sale under it, but he complained that the defendant had fraudulently failed to make him a party to the suit (original suit No. 859 of 1884) on the mortgage and he, therefore, sought for a declaration that the auction-sale was not binding on him and that the land should be restored to him (plaintiff). The final decree in that suit was that plaintiff could not get possession without redeeming the defendant's mortgage, and the Court expressly refused to decide the other issues. The plaintiff was not then suing to redeem, nor was he bound to do so. He merely wished to get rid of the effect which the defendant's purchase at the auction might have on his rights. He was clearly entitled to do this without, at the same time, suing to redeem, inasmuch as the defendant had omitted to make him a party to the suit on the mortgage, as he was bound to do under Section 85, Transfer of Property Act. There is thus no foundation for the plea that plaintiff's suit is *res judicata*, or is barred under Section 43, Civil Procedure Code.

The plaintiff not having been made a party to original suit No. 859 of 1884 is not bound by the sale thereunder. It was the defendant's duty to have made him a party so as to give him an opportunity of exercising his right (as purchaser of the equity of redemption) to redeem the defendant's mortgage. The defendant having failed in that duty cannot now take advantage of his own omission so as to shut out the plaintiff's right to redeem. Even if the defendant was ignorant of plaintiff's purchase, which may well be doubted in the present case, that will not affect the plaintiff's inherent right to redeem nor will the fact that plaintiff became aware of the defendant's suit (original suit No. 859 of [84] 1884) before the judgment therein was pronounced. The decree of the Lower Appellate Court was, therefore, right. We confirm it and dismiss this second appeal with costs.

(1) Second Appeal No. 181 of 1895 unreported. (Reported in 6 M.L.J. 51-ED.)

20 M. 84.

1896 OCT. 16.

APPELLATE CIVIL.

20 M. 84.

## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.*

KRISHNAPPA CHETTI (*Plaintiff*) v. ADIMULA MUDALI (*Defendant*).*
[16th October, 1896.]

*Contract Act—Act IX of* 1872, *Section* 23—*Unlawful agreement—Promissory note given in fraud of insolvency law.*

In a suit on a promissory note it appeared that it had been given by the defendant to the plaintiff in consideration of his withdrawing his threatened opposition to the discharge of an insolvent and consenting to an arrangement among the general body of creditors, who were not though the insolvent was aware of this transaction whereby the plaintiff was to obtain a special advantage:

*Held*, that the contract was unlawful and the suit could not be maintained.

[R., 16 M.L.J. 418.]

CASE referred for the opinion of the High Court under Civil Procedure Code, Section 617, and Presidency Small Cause Court Act. Section 69.

The case was stated as follows:—

"The plaintiff sues to recover from the defendant Rs. 763 due on a "promissory note, payable on demand, executed by the latter on the 4th "November 1893.

"The defendant's pleas are (i) no consideration; (ii) consideration, if "any, is unlawful; (iii) not liable for interest.

"The facts of this case are not disputed; they are spoken to by the "plaintiff, who was examined as the defendant's witness, and are as "follows:—

"One Kondalswamy Naidu, who failed in business and was indebted "to several creditors, applied to the Insolvent Court for the benefit of "the Act. At the same time efforts were made to enter into an arrange"ment with the creditors to pay them 4 annas in the rupee, and defendant "and another were appointed trustees to carry out the arrangement. "Most of the creditors [85] consented to this arrangement, but plaintiff, "a creditor to whom a sum of Rs. 1,400 was due, would not consent, "and threatened to oppose the discharge of Kondalswamy by the Insol"vent Court. He, however, agreed with Kondalswamy that if he would "pay him a sum of Rs. 700, being 8 annas in the rupee, separately, he "would sign the agreement along with others to take 4 annas in the "rupee, and would not oppose the discharge of Kondalswamy by the In"solvent Court. Accordingly Kondalswamy got defendant to execute the "promissory note A on which this suit is now brought; the plaintiff at "the same time executed a counter-agreement (Exhibit II), and it was "only after this that he executed the agreement (Exhibit I), by which all "the creditors agreed to take 4 annas in the rupee. This arrangement "between plaintiff Kondalswamy and defendant for the payment of "Rs. 700 by Kondalswamy through the defendant to the plaintiff was a "secret one, and made without the knowledge of the other creditors, well "knowing that, if they knew of it, they would not enter into the composi"tion deed. All the creditors except the plaintiff were paid 4 annas in "the rupee; and the plaintiff was offered a similar sum of 4 annas in the "rupee if he would give up the promissory note; but he would not give "it up and has not been paid as per agreement I.

* Referred Case No. 15 of 1896.

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"The point for determination is whether, upon these facts, the plaintiff is entitled to a decree in the suit. I am of opinion that he is not. "The consideration for the promissory note is unlawful within the meaning of Section 23 of the Indian Contract Act, as being against public "policy and in fraud of creditors; and therefore the promissory note is "void. It is only necessary in support of my view to refer to the case "*Agar Chand* v. *Viraraghavalu Chetti* (1); see also *McKewan* v. *Sanderson* (2). But my attention has been drawn to a recent decision of the "Madras High Court in *Amthul Latheef Syed Onissa Begum Saheba* v. "*Choonoolalji Sowcar* (3): and it is argued that the promissory note "being executed by a third party, and not by the debtor, it is not invalid. "This question was not necessary to be decided in that suit, as upon the "other finding that the promissory note was executed in the settlement "of her and her husband's **[86]** accounts, the judgment must be against "the defendant. In *ex parte Milner in re Milner* (4), it was decided that "there was no difference between an agreement executed by the debtor "himself or by a third party.

"The question I refer for the opinion of the High Court at the request of the plaintiff is, whether, upon the facts as found by me, the "plaintiff is entitled to a decree on the promissory note, or whether it is "void as being against public policy or in fraud of creditors or for any "other reason; and subject to such opinion I reserve judgment."

Mr. *K. Brown*, for plaintiff.

*Krishnaswami Chetti*, for defendant.

## JUDGMENT.

The circumstances under which the promissory note was given by the defendant are stated in the reference. The consideration was the withdrawal of threatened opposition to the discharge of the insolvent and the plaintiff's consent to the arrangement among the creditors.

By the promissory note the plaintiff secured for himself a larger payment than he was entitled to under the composition deed, and this was unknown to the other creditors.

It is contended on plaintiff's behalf that the circumstance that the note was given by a third party and not by the insolvent rendered the transaction an innocent one as far as the law of Insolvency is concerned.

In our opinion it makes no difference whether the note is given by the insolvent or by a stranger if it is given with the insolvent's knowledge and as a part of an arrangement for securing to one creditor an advantage over the others. The case is on all fours with *Knight* v. *Hunt* (5). The case cited (*Amthul Latheef Syed Onissa Begum Saheba* v. *Choonoolalji Sowcar* (3)) is distinguishable, for there it was expressly found that there was no fraud.

Here the other creditors being ignorant of the arrangement must be taken to have been deceived.

*Tiruvengadasami & Subbayya*, Attorneys for plaintiff.

(1) 3 M.H.C.R. 172.
(2) L.R. 20 Eq., 65.
(3) O.S. Appeal No. 16 of 1895 unreported.
(4) L. R. 15 Q.B.D. 605.
(5) 5 Bing. 432.

20 M. 87 = 2 Weir 470.

1896
OCT. 1.

APPELLATE CRIMINAL.

20 M. 87 = 2 Weir 470.

## [87] APPELLATE CRIMINAL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

QUEEN-EMPRESS *v.* KARUPPA UDAYAN AND OTHERS.*
[1st October, 1896.]

*Criminal Procedure Code—Act X of* 1882, *Section* 419—*Presentation of appeal petition by the clerk of the appellants' pleader.*

Presentation of an appeal petition by the clerk of the appellants' pleader is equivalent to a presentation by the pleader himself when it is signed by him and he is duly authorised.

PETITION under Sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the proceedings of T. Gopalan Nayar, Deputy Magistrate of Salem, in criminal appeal No. 33 of 1896.

The petitioners were convicted by Second-class Magistrate of the offence of voluntarily causing hurt. The petition of appeal against this conviction was presented by the clerk of the appellants' pleader who duly signed it, to the Court of the Deputy Magistrate. The Deputy Magistrate rejected the appeal as not having been properly presented. A similar appeal subsequently presented by the pleader in person was dismissed as being barred by limitation. The accused preferred this petition.

*Ragavendra Rau,* for the petitioners.

The Acting Public Prosecutor (Mr. *N. Subramanyam*) for the Crown.

### JUDGMENT.

The Deputy Magistrate's reason for not accepting the appeal at first made by the four petitioners was that it was not presented by themselves or their pleader, but only by their pleader's clerk. Such presentation has been held by this Court to be equivalent to a presentation by the pleader himself, when the petition of appeal is signed by the pleader and he is duly authorised as was the case here (vide *Queen-Empress* v. *Gudiyati Samuel* (1), *Queen-Empress* v. *Virappan Chetti* (2), and *Queen-Empress* v. *Chinna Basuva Chetti* (3)).

[88] We must therefore direct the original appeal to be replaced on the file and heard and disposed of according to law. The order on the second appeal filed by the petitioners is set aside.

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* Criminal Revision Case No. 305 of 1896.

(1) Criminal Revision Case No. 153 of 1894 unreported.
(2) Criminal Revision Case No. 50 of 1895 unreported.
(3) Criminal Revision Case No. 652 of 1895 unreported.

1896
Nov. 5.

APPELLATE CRIMINAL.

20 M. 88 = 2 Weir 42.

20 M. 88 = 2 Weir 42.

## APPELLATE CRIMINAL.

*Before Mr. Justice Shephard and Mr. Justice Davies.*

QUEEN-EMPRESS *v.* KANDAPPA GOUNDAN.*
[5th November, 1896.]

*Criminal Procedure Code—Act X of* 1882, *Section* 88—*Attachment of property as of an absconding person—Claim to property attached—Procedure.*

When a claim is made to property attached under Section 88 of the Code of Criminal Procedure, the Magistrate should stay the sale to give the claimant time to establish his right. If the Magistrate errs, the remedy of the aggrieved party is by civil suit and not by criminal revision petition.

[F., 4 L. B. R. 109; Rat. Unrep. Cr. C. 976; R., 12 Cr. L. J. 392 = 11 Ind. Cas. 256 = U. B. R. (1910) 4th Qr. p. 66.]

CASE referred for the orders of the High Court by W. J. Tate, Sessions Judge of Salem, being criminal revision case No. 35 of 1896 on the file of that Court.

The facts of the case were as follows :—

The brother of the petitioner in the District Court was accused of an offence and suspected of absconding to avoid a warrant, and the Magistrate ordered the attachment of his property under Criminal Procedure Code, Section 88. Cattle, grain and other property having been attached, the petitioner preferred a petition to the Magistrate stating that they belonged to him. The Magistrate dismissed the petition without examining the witnesses cited in support of his allegation, and this was the order complained against. The District Judge was of opinion that the Magistrate erred in not giving the petitioner an opportunity of proving his case. He accordingly referred the case to the High Court. In his letter of reference he cited *Queen* v. *Chumroo Roy*(1), *In re Chunder Bhon Singh*(2), *Queen-Empress* v. *Sheodihal Rai* (3), and *Queen-Empress* v. *Umayan* (4).

**[89]** Parties were not represented.

## JUDGMENT.

We do not think this is a case for interference.

In the first place the Magistrate, whose action is impugned, gives in our opinion good reasons for his order. But secondly we are disposed to agree with the view taken in other Courts of Section 88, Criminal Procedure Code. What may be said with regard to that section would equally apply to Section 386. In both cases we think, if the Magistrate errs, the remedy of the aggrieved party is by civil suit. All that we can say is that, in cases of dispute, the Magistrate should stay the sale of the property seized to give the claimant time to establish his right.

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* Criminal Revision Case No. 478 of 1896.

(1) 7 W.R.Cr. 35. (2) 17 W. R. Cr. 10. (3) 6 A. 487.
(4) Criminal Revision Case No. 560 of 1893 unreported.

**20 M. 89=7 M.L.J. 61.**

1896
DEC. 2.

APPEL-
LATE
CIVIL.

20 M. 89=
7 M.L.J. 61.

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

CHINTAMALLAYYA (*Plaintiff*), *Appellant* v. THADI GANGIREDDI (*Defendant*), *Respondent.** [2nd December, 1896.]

*Civil Procedure Code—Act XIV of* 1882, *Sections* 521, 522, 526—*Application to file award—Objection that submission was revoked before award made—Jurisdiction of Court to determine objection—Subsequent suit to annul award.*

The plaintiff's case was that arbitrators, to whom differences between him and the defendant had been referred, had out of enmity to him and at the defendant's instance, made a fraudulent award on 17th February after he had revoked his submission and had antedated it as on 1st February; that the defendant had instituted proceedings under Civil Procedure Code, Chapter XXXVII, and his objections to the above effect having been overruled, a decree was passed in terms of the award. He now sued to have it declared that neither the decree nor the award was binding:

*Held*, that the Court had jurisdiction to determine the genuineness or validity of the award in the proceedings under Chapter XXXVII, and that the present suit was not maintainable.

[**F.**, 16 M.L.J. 474; **R.**, 11 C.L.J. 131=5 Ind. Cas. 98 (99); 13 C.P.L.R. 53; 84 P.R. 1901=112 P.L.R. 1901; **D.**, 13 M.L.J. 275.]

APPEAL against the decree of K. Krishna Rau, Subordinate Judge of Cocanada, in orginal suit No. 40 of 1894.

The plaintiff alleged that he and the defendant had carried on business in partnership till 29th July 1892, when the partnership **[90]** was dissolved, and that certain differences between them were referred to arbitration; "that one of the arbitrators afterwards misappropriated " Rs. 1,800 which had been deposited with him by the plaintiff as part of " the assets of the partnership firm, and entertaining feelings of animosity, " induced the other arbitrator to join with him at the defendant's " instance in making an incorrect and fraudulent award against the " plaintiff after 17th February 1893, on which date the plaintiff had sent " the arbitrators a notice of revocation, but they antedated the award " making it appear that it was made on the 1st February 1893." The defendant having applied under Civil Procedure Code, Chapter XXXVII, to have this award filed in Court, the above objections were advanced by the present plaintiff and were overruled and a decree was passed in the terms of the award. The plaintiff now sued "for declarations setting aside " the decree and cancelling the award and for such further relief as he may " be found entitled to."

The Subordinate Judge held that the Court had power to overrule the present plaintiff's objections in the proceedings under Chapter XXXVII and that the present suit was not maintainable. He referred to *Micharaya Guruvu* v. *Sadasiva Parama Guruvu*(1), *Hurronath Chowdhry* v. *Nistarini Chowdrani*(2), *Surjan Raot* v. *Bhikari Raot*(3), *Dandekar* v. *Dandekars*(4), *Samal Nathu* v. *Jaishankar Dalsukram*(5) and *Amrit Ram* v. *Dasrat Ram*(6).

The plaintiff preferred this appeal.

*Krishnasami Ayyar*, for appellant.

*Ramachandra Rau Saheb* and *Subba Rau*, for respondent.

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* Appeal No. 199 of 1895.

(1) 4 M. 319. (2) 10 C. 74. (3) 21 C. 213. (4) 6 B. 663. (5) 9 B. 254. (6) 17 A. 21.

1896
DEC. 2.

APPELLATE CIVIL.

20 M. 89 = 7 M.L.J. 61.

## JUDGMENT.

The argument is that the Subordinate Judge had no jurisdiction to inquire into the genuineness or validity of the award apart from such grounds as would fall under Sections 520 and 521 of the Code of Civil Procedure, his authority being limited under Section 526 to the matters mentioned in those two sections.

It is true that different views of this matter have been taken by the different High Courts. In our opinion the correct view is that held by the Full Bench of the Allahabad High Court in *Amrit Ram* v. *Dasrat Ram* (1). It is also in accordance with the opinion expressed by this Court so far back as 1881 in *Micharaya Guruvu* v. *Sadasiva Parama Guruvu*(2) which we believe has [91] always been acted on. The weight due to that opinion and practice is not lessened by the fact that the decision in that case, so far as it relates to the right of appeal, has since been overruled in *Husananna* v. *Linganna*(3). No doubt, Parker, J., in that case expressed himself as inclined to take a different view, but we, however, are unable to do so.

The objection that the Subordinate Judge had no jurisdiction therefore fails and his decision in the previous case must be held to be binding in the present suit.

The appeal fails and is dismissed with costs.

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**20 M. 91.**

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

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SUBBARAYA PILLAI (*Plaintiff*) *Appellant v.* VAITHILINGAM (*Defendant*), *Respondent.** [8th and 16th September, 1896.]

*Trustee of composition deed—Managing member of a firm appointed as trustee—Right of suit after dissolution of the firm.*

Certain traders having been adjudicated bankrupts in the Courts of Mauritius, the creditors agreed to a composition deed, which was sanctioned by the Court, whereby the present plaintiff therein described as the managing member of the firm of S. and Company was appointed trustee and his firm guaranteed the payment of a dividend of 50 per cent. The firm was subsequently dissolved and its assets were assigned to a third party. The plaintiff now sued to recover costs decreed to him in his capacity as trustee in various suits in Mauritius, and it was objected that he was precluded from suing by the dissolution of his firm and the assignment away of its assets :

*Held*, that the plaintiff was entitled to maintain the suit.

SECOND appeal against the decree of E. J. Sewell, Acting District Judge of Tanjore, in appeal suit No. 300 of 1894, confirming the decree of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, in original suit No. 21 of 1893.

The plaintiff sued to recover the costs incurred in suits brought by the defendant against him in the Courts in Mauritius and [92] awarded to him by the final decrees of those Courts. It appeared that the plaintiff had been the managing member of a firm now dissolved which carried on

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* Second Appeal No. 720 of 1895.

(1) 17 A. 21. (2) 4 M. 319. (3) 18 M. 423.

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business as V. Subbarayan and Company and were creditors of Coo. Vaithilingam and his firm Coo. Vaithilingam and Company carrying on business in Mauritius. In 1887 the debtor and his partners were adjudicated bankrupts and Mr. G. Newton, the Accountant in Bankruptcy, was appointed receiver and manager of their respective estates, effects and properties. Exhibit C filed in this suit was a report of proceedings had in the Bankruptcy Court of Mauritius in this matter, and it appeared that at a meeting of creditors held in that Court under the chairmanship of the Judge in bankruptcy, the following resolutions were passed :—

"First, that a composition of fifty cents in the rupee be accepted in "full satisfaction of the debts, principal and costs, due to the creditors of "the bankrupts, exclusive of all privileged costs and preferential claims "which are to be paid in full and on condition that the two orders of "adjudication in this matter, respectively, dated the 25th April last and "23rd May also last, be annulled by the Court; second, that such com-"position be payable in eight equal monthly instalments to be paid one "month after the date of the annulling by the Court of the above orders "of adjudication, the privileged costs lawfully incurred to be paid cash "on the annulment of the orders of adjudication ; third, that the security "of V. Subbarayan and Company of Port Louis, traders, be accepted for "the payment of the above composition and that, in consideration of such "security all the joint and separate estate, effects and property both real "and personal of the firm Coo. Vaithilingam and Company and of the "individual members thereof, situate in Mauritius and in India be assign-"ed to the said V. Subbarayan and Company, and fourth, that Naga "Pillai Subbarayan, the managing member of the said firm, V. Subbarayan "and Company, be appointed trustee to recover and realise all the estate, "effects and property assigned as aforesaid and to carry out the above "arrangement."

A deed was drawn up to give effect to these resolutions and having been approved by all parties and duly executed by the receiver and manager, the insolvents and Subbarayan and Company, and also by the Judge in bankruptcy who sanctioned it, an order was made on the 22nd July by which it was, *inter alia*, ordered as **[93]** follows:—"It is further ordered "that the orders of adjudication of bankruptcy in this matter, dated, "respectively, the 25th day of April and the 23rd day of May last, be and "the same are hereby annulled, and it is further ordered that all the "estate and property of the bankrupts both in Mauritius and in India, "and all the books, papers and documents of the bankrupts be and the "same are hereby vested in Naga Pillai Subbarayan of Port Louis, trader, "managing member of the firm V. Subbarayan and Company, who is "hereby appointed trustee to carry out the said composition with full "power to recover and realise all the said estate and property."

By the composition deed V. Subbarayan and Company to whom the official receiver and manager and the bankrupts assigned all the joint and separate estates, effects and properties, both real and personal of the said bankrupts, situate in Mauritius and in India, bound themselves jointly and in solido with the bankrupts to the payment of 50 per cent. and of the privileged costs and preferential claims as therein stated.

The firm of V. Subbarayan and Company, on the termination of the period of their partnership, entered into an agreement with Rayappan Appon, which was reduced to writing and filed in this suit as Exhibit B, in July 1891, whereby the firm conveyed and assigned to Rayappan Appon "all that the firm of V. Subbarayan and Company could touch and receive

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"at whatever title from Coo. Vaithilingam and Company or from Coo. "Vaithilingam personally and principally all sums whatever in general that "could fall due to the said firm in connection with the law suits which are "actually pending before the tribunals of India and which are instituted "against Coo. Vaithilingam and Company and against Coo. Vaithilingam "personally by V. Subbarayan acting for and in behalf of the firm "V. Subbarayan and Company, because V. Subbarayan, as P. Kandasami "in his capacity, declares it in name only as of Coo. Vaithilingam and "Company and because all the sums paid by him in that capacity are "coming out of the funds belonging to the said firm of V. Subbarayan and "Company."

In December of the same year, and on 29th March 1892, two other deeds were entered into between Naga Pillai Subbarayan as trustee of the above composition deed and Rayappan Appon of [94] which the second containing a recital of the first was filed as Exhibit A.

This document was in the following terms :—

"Mr. Jean Baptist Rayappan Appon was only the guaranteed cessionary of the rights of the society, V. Subbarayan and Company *versus*. "Mr. Coo. Vaithilingam and Company and Coo. Vaithilingam in person; "and in order to facilitate the recovery of the above-mentioned rights by "the trustee of the arrangement, Coo. Vaithilingam and Company and "Coo Vaithilingam in person, the above-named Jn. Appon made over "again to Mr. Naga Pillai Subbarayan, trustee of the above-mentioned "arrangement, the rights yielded to himself, by virtue of a private deed, "registered on the seventh of last December.

"And now, the undersigned agree to annul purely and plainly the above "mentioned private and registered deed of the seventh of last December.

"The parties do will and mean that things be put again in the same "state as before the signing of the mentioned private deed as if this latter "one were not made.

"Mr. Naga Pillai Subbarayan, in his capacity as trustee, promises and "engages himself to do all diligence in India, in order to realise and "recover the rights given over to V. Subbarayan and Company by "Coo. Vaithilingam and Company and Coo. Vaithilingam in person; "and he engages himself to make every settlement with the above-"mentioned Jn. Appon in order to cover him and the other securities of "V. Subbarayan and Company with all the balances that could be due "to him for all the sums guaranteed and paid by him to the creditors of "V. Subbarayan and Company."

Various suits were brought in the Mauritius Court by the present defendant against the present plaintiff in his capacity as trustee and decrees for costs were given against the former. These decrees were unsatisfied and the present suit was brought to recover the amounts payable under them. It was objected by the defendant that the plaintiff had no right to sue by reason of the dissolution of the firm of Subbarayan and Company, and the assignment contained in Exhibit B. This objection prevailed with the Subordinate Judge, who passed a decree dismissing the suit and his decree was confirmed by the District Court.

[95] The plaintiff preferred this second appeal.

*Krishnaswami Ayyar* and *Srinivasa Ayyangar*, for appellant.

*Sundara Ayyar* and *Ramachandra Ayyar*, for respondent.

JUDGMENT.

The facts in this case have been set out with sufficient accuracy by the Lower Appellate Court, but we are of opinion that some of the documents

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have been misconstrued, and the rights of the plaintiff have been misunderstood. We are clearly of opinion that the plaintiff is entitled to maintain this suit as trustee appointed by the Mauritius Court under its order of the 22nd July 1887. The District Judge has misunderstood the intention of the composition deed, Exhibit C, and has not given due weight to the language and intention of the above order of the Court, made with a view to effectually carry out the object of the compensation deed. We do not doubt but that Naga Pillai Subbarayan (the plaintiff) was nominated in Exhibit C, as trustee in consequence of his being the managing member of the firm of V. Subbarayan and Company, who had undertaken to pay the creditors of the insolvents—Coo. Vaithilingam and Company—for whose benefit the estate of the insolvents was to be collected. But we find it difficult to understand what the Courts below mean by holding that plaintiff was appointed a trustee in his capacity as manager of that firm.

If the intention was that the manager, for the time being, of that firm, should be *ex-officio*, trustee, it would have been easy to have said so; yet, if this is not the meaning, we are unable to attach any definite meaning to the expression. Exhibit C does not say that N. Subbarayan should be appointed in his capacity as managing member. It merely describes him as holding that position. The words are "that Naga Pillai Subbarayan, the managing member of the said firm, V. Subbarayan and Company, be appointed trustee," &c.

That these words are merely descriptive appears even more clearly from the vesting order of the Court of Bankruptcy, dated 22nd July 1887. It runs: "It is further ordered that all the estate and property of the "bankrupts both in Mauritius and in India . . . . be, and the same "are, hereby vested in Naga Pillai Subbarayan of Port Louis trader, "managing member of the firm, V. Subbarayan and Company, who is "hereby appointed 'trustee' to carry out the said composition with full "power to recover and realise all the said estate and property." The [96] interposition of the plaintiff's address and of his description as a 'trader' between his name and the words 'managing member,' &c., seems to us to show clearly that the latter words are merely descriptive just as the word 'trader' undoubtedly is. It is, we think, this fundamental misconception that has led the Courts below to misunderstand the plaintiff's position.

The arrangement evidenced by the above two documents is that V. Subbarayan and Company should pay the creditors of the bankrupts fifty per cent. of their debts, that, in consideration of this, the bankrupts assign their property for the benefit of V. Subbarayan and Company and the plaintiff is appointed by the Court a trustee to collect the property of the bankrupts for the benefit of the firm of V. Subbarayan and Company and the property is 'vested' in him as such trustee. The Subordinate Judge thought that, as the plaintiff was suing for costs awarded against defendant after the date of the composition deed, the plaintiff as trustee could not sue for those costs, but the District Judge has pointed out that those suits were brought by the defendant against plaintiff for acts done by him as trustee and the costs were awarded to plaintiff as trustee. There is nothing to prevent the plaintiff from now suing as trustee to recover costs awarded to him in suits maintained by him as trustee, though those suits were maintained for the benefit of V. Subbarayan and Company and were financed by that firm. Plaintiff, no doubt, may be bound to account to the firm for such costs, but that cannot affect the plaintiff's right to recover them from the defendant in accordance with the decrees. If any of the costs were

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awarded, as the Subordinate Judge seems to think they were *to the firm*, the plaintiff alone could not sue for them, but we understand that this is not the case.

The District Judge has also, we think, misapprehended the effect of Exhibit B. He rightly states that what may be called the legal estate of the bankrupts vested in the plaintiff, though their equitable estate vested in the firm of V. Subbarayan and Company, but when he adds that Exhibit B assigns the whole estate both legal and equitable to Rayappan Appon and that the latter is, therefore, the only person entitled to maintain this suit, we think he misconstrues Exhibit B. Exhibit B transfers to Appon all the interest which the firm of V. Subbarayan and Company had acquired in the estate of the bankrupts. It neither could nor **[97]** did transfer anything more. Plaintiff, as a member of the firm, assented to and admitted that he was bound by that document, but it did not, and could not, assign either the rights or the duties of the plaintiff as trustee.

Even if the plaintiff desired to do so, he could not delegate his rights or duties as trustee, but there is nothing to show that he attempted to do so.

The only effect of the document (Exhibit B) is that Rayappan Appon, instead of the firm of V. Subbarayan and Company, thereby became the beneficiary for whom the plaintiff is to collect the bankrupt's assets, and to whom he must account for the same, or for other moneys received by him as trustee. Exhibit A shows that Appon and the plaintiff both correctly understood their respective rights, and the duty of plaintiff as trustee.

The result, then, is, that the plaintiff as trustee can maintain this suit. We may observe that the position which we have assigned to plaintiff is in harmony with that which held in the case reported in *Subbaraya* v. *Vythilinga* (1), a case arising out of the same transactions and practically between the same parties.

We set aside the decrees of the Courts below and direct that suit be restored to the file of the Subordinate Judge, and be disposed of according to law.

Plaintiff must have his costs in the Lower Appellate and in this Court. The costs in the Subordinate Judge's Court will abide and follow the result.

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## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Benson.*

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KONDAYYA CHETTI (*Plaintiff*), *Appellant v.* NARASIMHULU CHETTI (*Defendant*), *Respondent.** [21st, 22nd September and 13th November, 1896.]

*Contract Act—Act IX of* 1872, *Section* 122—*Agency to sell, coupled with interest—Discretion as to price left with agent—Power of principal to impose limits as to price.*

The defendant consigned goods to a firm in London for sale, and in respect of each consignment he received an advance from the plaintiff who was the

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* Appeal No. 6 of 1896.
(1) 16 M. 85.

[98] agent of the London firm, and signed a consignment note, which contained the following passage:— 1896 Nov. 13.

"I hereby authorize you to sell the above goods at the best price obtainable "without reference to me and I give you full discretion and power to act on my "behalf to the best of your judgment in regard to such sale and in all matters "connected with the management of this consignment. Should there be any "shortfall after realization of the above consignment, I hereby authorize you to "draw on me for the amount, and I engage to honour such draft and to pay it "on presentation." APPELLATE CIVIL. 20 M. 97.

The plaintiff guaranteed the payment of the redrafts to the London firm on whose account he made the advances to the defendant. Shortfalls having occurred on certain consignments and the London redrafts having been dishonoured, the plaintiff paid them, and now sued to recover the amount from the defendant. It appeared that consignments had been sold at prices less than certain limits which have been fixed by the defendant subsequent to the receipt of the advances and the signature of the consignment notes:

*Held*, that the defendant had no right (regard being had to the terms of the consignment note and the course of dealing between the parties) so to impose limits of price, and that the plaintiff was entitled to recover.

[R., 13 Cr.L.J. 721 (722)=16 Ind. Cas. 753=6 S.L.R. 76 (79).]

APPEAL against the judgment of Mr. Justice Subramania Ayyar, in civil suit No. 120 of 1894, on the original side of the High Court.

The plaintiff sued to recover Rs. 4,765 under the circumstances stated on the judgment of Subramania Ayyar, J.

Mr. *K. Brown*, for plaintiff.

Mr. *R. F. Grant*, for defendant.

SUBRAMANIA AYYAR, J.—The plaintiff sues for Rs. 4,765 being the amount paid by him on the 13th July 1894 to Messrs. Robert Von Glehn & Co. of London on account of two Bills of Exchange, drawn by them on the defendant for the difference between the amount advanced by them on certain consignments of Salemporos or blue cloths forwarded by the defendant through the plaintiff to Von Glehn & Co. for sale in London, and the price realized by the sale of the goods, which fell short of the advances; the plaintiff, in consequence of the defendant's refusal to honour the bills having had to pay the amount due under them as drawee in case of need, in accordance with a contract of guarantee he had entered into with Von Glehn & Co. to make good to them any deficiency that might arise in circumstances similar to those in the present instance.

The substantial defence is that Von Glehn & Co. allowed the goods to be sold for prices below those limited by the defendant, [99] that if an account be taken with reference to the rates fixed by the defendant, Von Glehn & Co. would be found indebted to him, that Von Glehn & Co. were not entitled to claim the deficiency caused by their wrongful act and the plaintiff is therefore not entitled to the amount sued for.

The main questions raised and discussed at the trial were (i) whether assuming that the defendant did place limits as alleged, Von Glehn & Co. were entitled in law to sell under the limits without the assent of the defendant; (ii) whether the defendant did in fact place limits and Von Glehn & Co. did sell in disregard of such limits.

With reference to the question of law stated above, one contention urged on behalf of the plaintiff was that, in consequence of the advances admittedly received by the defendant from Von Glehn & Co., the consignments became a pledge in their hands entitling them to sell the goods, for the purpose of reimbursing themselves the amount advanced, irrespective of the wishes of the defendant. This proposition is quite unsustainable, for "the relation of principal and factor, where money has been advanced on

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goods consigned for sale, is not that of pawnor and pawnee" *Smart* v. *Sandars* (1). The factor acquires only a lien which gives no right to sell the goods (*Donald* v. *Suckling* (2).

Another contention urged on behalf of the plaintiff was that the relation between Von Glehn & Co. and the defendant was, in consequence of the advances, an agency coupled with interest which was irrevocable. Now in *Smart* v. *Sandars* (1) already cited it was laid down that a factor, to whom goods have been consigned generally for sale and who has subsequently made advances to his principal on the credit of the goods, has no right to sell them contrary to the orders of his principal on the latter neglecting on request to repay the advances, although such sale would be a sound exercise of discretion on his part; his authority to sell not becoming, by reason of the unpaid advances, irrevocable as an authority coupled with an interest. And in *De Comas* v. *Prost* (3) the Judicial Committee of the Privy Council followed *Smart* v. *Sandars* (1) and held that mere advances made by a factor whether at the time of his employment as such or **[100]** subsequently cannot have the effect of altering the revocable nature of an authority to sell unless the advances are accompanied by an agreement that the authority shall not be revocable.

The learned Counsel for the plaintiff drew my attention to *Parker* v. *Branker* (4) where the Supreme Judicial Court of Massachusetts held that a Commission merchant, having received goods to sell at a certain limited price and made advances upon them, had a right to reimburse himself by selling such goods at the fair market price, though below the limit, if the consignor had refused an application and after a reasonable time to repay the advances. Substantially the same view was taken in *Brown* v. *McGran* (5) and in *Field* v. *Farrington* (6) and in Section 371 of Story on Agency the law is stated in accordance with that view. But *Brown* v. *McGran* (5) was brought to the notice of the Court in *Smart* v. *Sandars* (1), and since the judgments contain no reference to that case, I think it must be taken that the American rule did not commend itself to the Court of Common Pleas whose decision, having been adopted by the Judicial Committee, should be followed by the Courts in this country. Even if it be contended that *De Comas* v. *Prost* (3) was a Colonial case, it will be seen from the observations in *Murtunjoy Chuckerbutty* v. *Cockrane* (7) the Judicial Committee held that in the absence of any usage or custom qualifying the general mercantile law of England that law applied to India also.

A third contention was that if the law before the Indian Contract Act was as stated above, that enactment has changed the law in conformity with the American rule. In support of this contention the learned Counsel relied on illustration (*b*) to Section 202. But the case put in that illustration seems to be an ordinary instance of a power coupled with interest coming within the well established rule stated by Wilde, C.J., in *Smart* v. *Sandars* (8) thus : " Where an agreement is entered into on a sufficient consideration whereby an authority is given for the purpose of securing some benefit to the donee of the authority such an authority is irrevocable." For, the language of the illustration in question shows distinctly that the power to sell was given **[101]** expressly for the purpose of enabling the consignee of the goods to repay himself the advances made,

(1) 3 C.B. 400 (401) = 5 C.B. 895.
(2) L.R., 1 Q.B. 585.
(3) 3 M.P.C. (N.S.), 158.
(4) 22 Pickering, 40.
(5) 14 Peters 479.
(6) 10 Wallace 141.
(7) 10 M.I.A. 229.
(8) 5 C.B. 895 (917).

see observations of Sargent, C.J., in *Jafferbhoy Ludhabhoy Chattoo* v. *Charlesworth* (1). The result of the authorities (to borrow the language of the Chief Justice in the case just cited) is "Where the factor for sale who has made advances claims the right to sell *invito domino*, the question is whether there was an agreement between the parties express or to be inferred from the general course of business or from the circumstances attending the particular consignment that the factor should, under any and what circumstances, have the power to sell against the will of the owner of the goods, the onus of proving which lies on the factor who has made the advances.

Let us now see whether any agreement express or implied can be made out from the facts of this case. The plaintiff's counsel relied on paragraph two of the consignment letters (Exhibits B to N) and contended that taking them along with the advances, it should be held that the defendant created expressly an agency coupled with interest. This contention is unsustainable; for although the paragraph in question authorizes Von Glehn & Co. to sell the goods at the best price obtainable without reference to the defendant, and gives them full discretionary power to act on his behalf to the best of their judgment in regard to such sale and in all matters connected with the management of the consignments, it does not say that the defendant agreed that the power so conferred will not be altered or modified. In truth the contention is only another way of asking me to hold that mere advances made by a factor *at the time of his employment* has the effect of altering the revocable nature of the authority to sell, which, the Privy Council ruled, they had not. It is thus clear there was in this case no express contract not to revoke. Nor are there any circumstances from which such a contract can be implied. I must therefore hold that the plaintiff has failed to make out that Von Glehn & Co. were entitled to sell irrespective of the limits, if any imposed by the defendant.

The next question is whether the defendant did place limits as alleged by him and whether the goods were sold in disregard of such limits. The defendant's evidence on this point is supported not only by the admissions made by the plaintiff in the course of **[102]** his examination but also by the correspondence produced on both sides.

[The learned Judge then proceeded to discuss the evidence on this point, and in the result dismissed the suit with costs.]

The plaintiff preferred this appeal.

Mr. *K. Brown*, for appellant, contended, firstly, that regard being had to the nature of the contract between the parties, the factor had a right to sell regardless of the limits imposed on the defendant, under the rule deducible from *Smart* v. *Sandars* (2) and other English authorities relating to the subject, and, secondly, that, even if it were not so, the case was governed by the Contract Act, which in Section 202 laid down without qualification the rule which Wilde, C. J. in the case above cited (see p. 915) explained to be subject to various qualifications in England. *Bank of England* v. *Vagliano* (3), *Damodara* v. *Secretary of State* (4).

Mr. *R. F. Grant*, for respondent, supported the judgment on the grounds stated therein.

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(1) 17 B. 520 (543).
(2) 3 C.B. 400 (401) = 5 C. B. 895.
(3) [1891] A.C. 144.
(4) 18 M. 91.

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## JUDGMENT.

Plaintiff and defendant are merchants trading in Madras. The defendant used to consign goods to Messrs. Von Glehn and Co. of London for sale. The consignments were made through the plaintiff. As each consignment was shipped, the defendant drew on Von Glehn and Co. for the value in favour of the plaintiff, who negotiated the drafts with a Bank, and paid the proceeds to the defendant. The course of business was to have the goods valued and sold in London by Von Glehn and Co., who repaid themselves out of the proceeds, and, in case of a shortfall, drew on defendant for the amount. If defendant failed to pay the redraft plaintiff was bound to do so. He, in fact, guaranteed Von Glehn and Co. On certain transactions of the above character which took place in 1893-94, there was a shortfall amounting in all to Rs. 4,765. Von Glehn and Co. drew on defendant for the amount, but he refused to honour the drafts, and the plaintiff then paid them. The plaintiff's present suit was to recover the sum so paid.

The substantial defence was that Von Glehn and Co. sold the goods under the limits imposed by the defendant, and that the latter was, therefore, not bound to pay the shortfall.

[103] The learned Judge who tried the case found for the defendant on the above issue and dismissed the suit. Plaintiff appeals on the ground, *inter alia*, that under the terms of the contract with defendant, and in all the circumstances of the case Von Glehn and Co. had power to make the sales, notwithstanding the limits imposed by the defendant. The learned Judge has referred at some length to the English authorities which deal with the right of a factor who has made advances on goods consigned to him for sale to sell them *invito domino*; and we are not disposed to dissent from his conclusions as to the general result of those cases. We are, however, of opinion that those cases do not decide the exact question which arises in the present case, nor do we think that the present case can be decided by a reference to the English authorities alone. The Indian Contract Act (IX of 1872) is the law with reference to which the rights of the parties in the present case must be decided. We are not prepared to say that the law on the matter in issue, as laid down in the Indian Contract Act, differs from the law which prevails in England, but if it does differ we are bound to decide in accordance with the Indian Act. This proposition is, indeed, self-evident, and the principle has recently been strongly affirmed by Lord Herschell in *Bank of England* v. *Vagliano* (1) in these words:—"I think the proper course is, in the first instance, to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specially dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to

(1) [1891] A. C. 144.

discover what the law was." He then refers to circumstances in which a reference to prior authorities is legitimate and proper, as, for [104] instance, where the words of the statute are of doubtful import, and adds "What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground."

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It is to be observed that no evidence of the general custom of merchants in Madras in reference to the matter in issue has been given, so that we are left to decide it by applying the provisions of the Indian Contract Act to the terms of the contract entered into between the parties and the general course of their business.

Section 202 of the Contract Act runs as follows :—" Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest ; " and illustration (*b*) shows how the rule may be applied in a concrete case, as follows :—A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death."

The terms of the contract between the parties, so far as those terms are express, are contained in the consignment notes, which are all worded in the same way. The following is one of them :—

" *Madras*, 10*th October* 1893.

To MESSRS. ROBERT VON GLEHN AND SONS,
LONDON.

DEAR SIRS,

I have the pleasure to advise consignment to your care for sale on my account through Mr. A. Kondayya Chetti.

V. N. $\frac{1}{2}$=2 B 1 Blue Salempores.
,, 29/35=7 B/
,, 1/5=C 1 Bees wax.

per C/Macdonald against which I have valued on you at three months' sight for £205 and I beg your acceptance of my drafts.

I hereby authorize you to sell the above goods at the best price obtainable without reference to me and I give you full discretionary power to act on my behalf to the best of your judgment in regard to such sale, and in all matters connected with the management of this consignment.

[105] Should there be any shortfall, after realization of the above consignment, I hereby authorize you to draw on me for the amount and I engage to honour such draft and to pay it on " presentation, without dis-" puting the sales or the accuracy of account sale and account current, " rendered by you.

" I further hereby declare that this letter has been read and explained " to me and I fully understand its meaning.

I remain, Dear Sirs,
Yours faithfully,
V. NARASIMMULU CHETTI."

It seems to us that the reasonable interpretation of this contract is that the consignee shall have authority to sell the goods at his discretion,

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and repay himself the advance out of the proceeds, drawing on the consignor in the event of a shortfall. The course of business between the parties shows that Von Glehn and Co. were intended to recoup themselves out of the sale-proceeds and to draw on the defendant for any shortfall.

Illustration (*b*) seems to us to be in point. The learned Judge in one passage, following a remark of Sir C. Sargent, C. J., in *Jafferbhoy Ludhaboy Chattoo* v. *Charlesworth* (1), denies the applicability of the case in illustration (*b*) to the present case on the ground that the power to sell is, in illustration (*b*), given 'expressly' for the purpose of enabling the consignee of the goods to repay himself the advances made. No doubt in the illustration the authority to so appropriate the sale proceeds is expressly given, but in the section itself there is no limitation to cases where the authority is so expressly given. In the section itself all that is necessary is that the agent should himself have 'an interest in the property,' to be sold, and it seems to us that such interest may be inferred from the language of the document and from the course of dealings between the parties, and need not be expressly given. It is the existence of an interest, not the mode in which it is given, that is of importance. The terms of an illustration are not always co-extensive with the terms of the section, or proposition of law, intended to be illustrated; and it is contrary to true principles of interpretation to cut down the scope of a section by a reference to its illustrations. Apparently **[106]** if the consignment note had said in express words "you are to repay yourself the above advance out "of the sale-proceeds of the consignment" the learned Judge would have considered Section 202 applicable, and the authority to sell irrevocable, and would have decided in plaintiff's favour. As already stated there is nothing in the section to show that the authority to appropriate the sale-proceeds to the debt must be 'expressly' given, nor can we find any ground in reason for such a limitation. The provision in the consignment note that the consignee is to sell at his discretion and in the event of a shortfall is to draw on the defendant taken with the course of business between the parties, shows that it was their intention that Von Glehn and Co. should repay themselves the advances out of the proceeds. That intention, being clearly indicated, is as valid and as effectual for the creation of an interest in the consignees as if it were expressly stated. If the consignees had such an interest the authority to sell could not be revoked to the prejudice of such interest, except in accordance with an express contract reserving such power to the defendant, but of such express contract there is no proof in this case.

The authority to sell at the consignee's discretion, and without reference to the consignor, is given in the consignment note in the widest terms, and the only limit imposed is that the price should be 'the best obtainable.' The plain meaning of the words is that the consignee is to choose the time and mode of sale without reference to the consignor and obtain the best price available in the market. It was open to the consignor to have made it a part of the contract that he might impose limits from time to time, and, had he done so, the consignee who was making advances, would have been able to protect himself against the greater risk that he would have thus run. But the consignor expressly gave up to the consignee the discretion with regard to sale, and it can hardly be doubted but that his doing so enabled him to obtain better terms in regard

(1) 17 B. 520 (543).

to the advances. It seems to us unreasonable to hold that, under these circumstances, the consignor could on the next day revoke the authority to sell, or that the consignee would allow him to do so without consideration. The consignor by placing too high a limit on the goods might keep the consignee out of the money he had advanced for a far longer time than that contemplated, and in the end leave him without remedy, except the slow and inadequate one of a suit to recover the [107] advances. No doubt the letters between defendant and Von Glehn and Co. show that the former imposed limits after the consignments were sent, and neither plaintiff nor Von Glehn and Co. at first repudiated, or protested against, his right to do so. Von Glehn & Co. protested against the advisability of his holding out for impossible prices, and put off sales in deference to his wishes, but we do not think that this action amounts to an admission by Von Glehn & Co. that they were bound, in all circumstances, to obey his instructions. They were naturally anxious to please a client and to defer to his wishes but when the market continued to fall month after month, and the security in their hands to become less and less, they at length resorted to the power of sale given to them and sold without regard to the limits named by the defendant. They would, no doubt, have postponed the sales still further if defendant had complied with their request to remit them a sufficient sum to cover the estimated fall in the value of the goods, so that the security in their hands might still be sufficient, but this the defendant did not do. In these circumstances it seems to us that the consignees were justified in exercising their legal right of sale, instead of allowing the security in their hands to diminish still further.

We must, therefore, reverse the decree and give judgment for plaintiff as sued for with costs throughout.

*Wilson & King*, attorneys for appellant.

*Branson & Branson*, attorneys for respondent.

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20 M. 107=7 M.L.J. 66.

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Benson.*

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KOMMACHI KATHER (*Plaintiff*), *Appellant v.*
PAKKER AND OTHERS (*Defendants*), *Respondents.**
[8th and 20th October, 1896.]

*Civil Procedure Code—Act XIV of* 1882, *Section* 295—*Rateable distribution—Decree for money—Mortgage decree.*

The plaintiff and defendant, respectively, held successive mortgages on the same land. The defendant obtained a decree on his mortgage against the land and [108] in respect of any unrealized balance against the mortgagor, two months' time for redemption being given. The plaintiff then obtained a like decree. The defendant abandoned his claim on the mortgage premises and attached other property of the mortgagor. The plaintiff applied to execute his decree against the mortgage premises and the other property, but with regard to the latter his application was rejected. The defendant, having brought to sale the property attached, the plaintiff applied under Civil Procedure Code, Section 295, for rateable distribution which was refused. The plaintiff then brought to sale the

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* Second Appeal No. 819 of 1895.

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mortgage premises which did not realize the amount of the debt, and he now sued to recover the sum which would have been payable to him under Section 295 :

*Held*, that the plaintiff's decree was a decree for money within the meaning of Section 295, and that he was entitled to recover the sum claimed :

*Per cur.* the property ought not to have been sold and the money paid to the defendant until the mortgaged property had been sold and had been found insufficient to pay his debt.

[**Diss.**, 27 C. 285 (289) ; **F.**, 28 M. 224 ; **Appr.**, 28 M. 473 (477) = 15 M.L.J. 126; **R.**, 3 A.L.J. 585 = A.W.N. (1906) 237 = 1 M.L.T. 247 ; 21 M.L.J. 1036 (1040) = 10 M.L.T. 429 = (1911) 2 M.W.N. 458 (460) = 12 Ind. Cas. 689 ; **D.**, 17 Ind. Cas. 940 (941) = 23 M.L.J. 699 = 12 M L.T. 660 (662).]

SECOND Appeal against the decree of A. Thompson, District Judge of North Malabar, in Appeal Suit No. 445 of 1894, confirming the decree of K. Imbichunni Nayar, District Munsif of Taliparamba, in Original Suit No. 199 of 1894.

The facts of this case were stated by the District Munsif in paragraph 8 of his judgment as follows :—

"The plaintiff in the present case was the mortgagee of eight items "of real properties under one K. V. Chintan and five of his Anandiravans. "The first defendant held a puisne mortgage on two or three of the same "items. In Original Suit No. 76 of 1893, the first defendant sued his "mortgagors and the present plaintiff for the recovery of his mortgage "amount by the sale of the properties mortgaged and from the persons of "the mortgagors. A decree was recorded in his favour to the effect that "in default of the defendants' paying the amount of his claim within two "months, the properties mortgaged should be sold subject to the prior claim "of the present plaintiff and if the sale-proceeds be insufficient to satisfy "the whole of his decree, the balance should be paid by the mortgagors "personally. The present plaintiff then brought a suit on his prior mortgage "and a decree worded almost as above was recorded in favour of him also. "The present defendant was a party to it. He then gave up his claim on "the properties mortgaged to him and caused attachment of the parambas "mentioned in the present plaint which were finally sold in auction for "Rs. 1,377. The sale-proceeds were set off against the first defendant's "decree amount. Over two months before the aforesaid sale, the present "plaintiff applied for the realization of his decree **[109]** by the sale "of the properties mortgaged, and by attachment of other properties. "The first part of his prayer was allowed while the second part was dis- "allowed. In the case of the plaintiff, then, the judgment-debtors ap- "plied for an adjournment of the sale and obtained time till September "1893. The sale, at the instance of the first defendant, took place in the "meantime and the plaintiff asked for rateable share. His application "was rejected on the ground that he had then no decree which was "capable of being executed against the judgment-debtors personally. The "plaintiff appealed and the appeal was rejected as being not maintainable. "In a subsequent application for share made by the plaintiff after the "properties mortgaged to him were sold and the sale-proceeds were found "to be insufficient to fully meet his claim, he was given Rs. 25. The plain- "tiff now sues to recover Rs. 495-15-0, alleging that he was entitled to "get the same when he first applied for share."

The terms of the decree in question are given in the judgment of the High Court.

The District Munsif dismissed the plaintiff's suit and the District Judge upheld his decision for the reasons stated by the High Court.

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The plaintiff preferred this second appeal.

*Ryru Nambiar*, for appellant.

*Sankara Menon*, for respondents.

JUDGMENT.

The facts of the case are correctly stated in paragraph 8 of the District Munsif's judgment.

The District Munsif, assuming that the plaintiff had a 'decree for money' within the meaning of Section 295, Civil Procedure Code, still dismissed the suit on the ground that it was incapable of execution, except as against the mortgaged property, at the time when the plaint property was sold at the instance of first defendant.

The District Judge confirmed the District Munsif's decree for two reasons, firstly, because Section 295 (*c*) in his opinion barred the plaintiff's claim, and secondly, because the plaintiff's decree was not 'a decree for money' within the meaning of Section 295, Civil Procedure Code.

The plaintiff appeals, and we think, with good reason. The District Judge is manifestly in error in supposing that Clause (*c*) **[110]** of Section 295 governs the case. That clause refers only to property sold "in execution of a decree ordering its sale for the discharge of an incumbrance thereon." In the present case, the property sold by first defendant was not the encumbered property, but other property of the judgment-debtor.

The plaintiff and defendant had respectively a first and a second mortgage over other property of the same mortgagor, but neither of them held any incumbrance on the property sold by first defendant. It seems to us that the plaintiff and first defendant were in exactly the same position with regard to this property, and each was equally entitled to a rateable share of the sale proceeds.

The District Judge is, in our opinion, wrong in holding that the present decree is not 'a decree for money' within the meaning of Section 295, Civil Procedure Code. No doubt, his view is supported by the language used in *Ram Charan Bhagat* v. *Sheobarat Rai* (1); but the opposite view was held by the Calcutta High Court in *Hart* v. *Tara Prasanna Mukherji* (2). The exact terms of the decree in the Allahabad case are not reported, nor is the Calcutta case referred to therein; but in our opinion the law is correctly stated in the latter case.

The decree before us runs as follows:—"That the defendants do pay "plaintiff within two months from this date Rs. 2,500 with interest and "costs and that in default plaintiff do recover the same by sale of the "plaint property, and the balance, if any, from first to sixth defendants." It seems to us that this is a decree for money and that it does not lose this character, because the decree declares the mode and the order of the procedure by which it is to be realized.

The first paragraph of Section 295 runs as follows:—"Whenever "assets are realized by sale or otherwise in execution of a decree, and "more persons than one have, prior to the realization, applied to the Court "by which such assets are held for execution of decrees for money "against the same judgment-debtor, and have not obtained satisfaction "thereof, the assets, after deducting the costs of the realization, shall be "divided rateably among all such persons."

**[111]** It is under this paragraph that the plaintiff claims the right to a rateable share of the property. Formerly the creditor who first attached

(1) 16 A. 418.

(2) 11 C. 718.

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property had a prior claim to have his decree satisfied out of the sale-proceeds to the exclusion of other creditors, but now all judgment-creditors who apply to the Court, prior to realization, are entitled to share rateably, and under the penultimate paragraph of the section, if any of such assets be wrongly paid to any person, a judgment-creditor entitled to a rateable share may sue to recover the same from the person wrongly paid. It is under this paragraph that the plaintiff brings his suit. In the words of the Calcutta case already referred to "The object of the section appears to "us to be to provide for the rateable distribution of the assets of a judg-"ment-debtor among all persons who have obtained decrees ordering the "payment of money to them from the judgment-debtor; and the fact "that a person, who has obtained such a decree, also holds security or is "entitled to any other relief under the decree, is immaterial. There is, "therefore, we think nothing in the section which takes away the right of a "mortgagee, who has obtained a decree upon his mortgage, to proceed in the "same suit against property of the mortgagor not subject to the mortgage "when there are other creditors—nothing which shows that the only per-"sons entitled to share rateably in the proceeds of sale of property sold in "execution of a decree are those who have obtained decrees for money "only. We think, therefore, that every decree, by virtue of which money "is payable, is to that extent a 'decree for money' within the meaning of "the section, even though other relief may be granted by the decree; and "that the holder of such a decree is entitled to claim rateable distribution "with holders of decrees for money only."

If it were held otherwise it would often result that the insufficiently secured creditor might find himself worse off than the wholly unsecured, but more prompt and pressing, creditor, and an inducement would exist for that scramble for first attachment which the recent alterations of the law were designed to remove. The unsecured creditor is not placed at an unfair disadvantage, since he advanced his money on the faith of the debtor's general credit apart from the property mortgaged, and it is always open to such a creditor to compel the sale of mortgaged property, if it is likely to yield any surplus over and above the mortgage money.

[112] It remains to consider the ground on which the District Munsif dismissed the suit, *viz.*, that the plaintiff's decree was incapable of execution against anything save the mortgaged property, at the time when the first defendant attached the other property. It is true that at that time the plaintiff was not in a position to immediately execute his decree, but neither was the first defendant, for the decree in favour of the latter was subject to precisely the same limitation as the plaintiff's decree. The property ought not, therefore, to have been sold and the money paid to the first defendant until the mortgaged property had been sold and had been found to be insufficient to pay his debt. His title to receive payment out of the property sold, did not arise until the mortgaged property was found to be insufficient, and the plaintiff's title arose at precisely the same time. The payment of the whole of the sale-proceeds to the first defendant was, therefore, wrong, as the plaintiff was entitled to a rateable share.

In this view we must set aside the decrees of the Courts below, and give judgment for plaintiff as sued for with costs throughout.

20 M. 112=7 M.L.J. 76.

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## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

NALLA KARUPPA SETTIAR (*Plaintiff*), *Appellant v.* MAHOMED IBURAM SAHEB (*Defendant*), *Respondent.**
[19th, 20th and 21st October and 26th November, 1896.]

*Suit on a foreign judgment—Jurisdiction of foreign Court—Residence of defendant—Constructive residence.*

The plaintiff having obtained against defendant a judgment in the District Court of Kandy now sued in British India to enforce it. It appeared that the defendant was domiciled and ordinarily resident in British India and that he had not appeared to defend the suit at Kandy and was not at the date of that suit or subsequently even temporarily resident in Ceylon; but he was a partner in a firm which carried on business at Kandy and he was interested in lands at that place which he had visited once or twice.

*Held*, that the Court at Kandy had no jurisdiction over the defendant.

[Appr., 24 B. 86 (88); R., 29 M. 239-N (268); 24 M.L.J. 619 (624).]

**[113]** SECOND Appeal against the decree of E. J. Sewell, District Judge of Tanjore, in Appeal Suit No. 477 of 1893, reversing the decree of C. Venkobachariar, Subordinate Judge of Tanjore, in Original Suit No. 5 of 1893.

The plaintiff sued to recover from the defendant certain sums due under decrees passed against the defendant by the District Court of Kandy in Ceylon.

The defendant pleaded, among other things, that the District Court of Kandy had no jurisdiction, as he was, at the time the suits were brought and the decrees passed, permanently residing in British India, that he had no notice of the suits, and was not aware of their institution, and that the decrees were not properly passed against him.

The Subordinate Judge found that there was sufficient service of notice of the suits to make the defendant liable, and that the Court in Kandy had jurisdiction, and passed a decree as prayed.

The defendant appealed against this decision and the District Judge reversed the decree appealed against on the grounds which are stated in the judgment of the High Court.

The plaintiff preferred this second appeal.

*Bhashyam Ayyangar*, for appellant.

*Pattabhirama Ayyar*, for respondent.

## JUDGMENT.

The plaintiff sued in the Tanjore Subordinate Judge's Court in British India to recover certain sums under decrees passed in his favour by the District Court of Kandy in Ceylon. The defendant raised a number of pleas, but the Subordinate Judge found against him on all the issues and decreed the claim.

On appeal the District Judge tried three main questions, *viz.*—

(i) whether notice of the suit in the Kandy Court was so served on the defendant as to justify the British Indian Court in passing a decree on the judgment of the foreign (Kandy) Court:

* Second Appeal No. 854 of 1895.

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(ii) whether the foreign Court had jurisdiction over the person of the defendant who was domiciled and resident in British India ; and

(iii) whether the defendant was a minor when the judgment was given, and whether. in consequence, the judgment was one which could be made the basis of a suit in British India.

[114] On all these issues the District Judge decided in defendant's favour, and, therefore, dismissed the suit.

The plaintiff now appeals on all the issues decided against him.

We do not, however, think it necessary to discuss the first and the third of the above issues, as we are of opinion that the decision of the District Judge on the second issue is right, and that the plaintiff's suit must fail on that ground, whatever the decision on the other issues might be.

The defendant was the chief partner in the firm of Iburam Saheb and Company, which carried on business in Kandy under the terms of a deed of partnership (Exhibit A). The plaintiff was domiciled and ordinarily resident in British India, but he visited Kandy once or twice and his family owned some immoveable property there in which he claimed to have an interest

The plaintiff was not even temporarily resident in Ceylon when the suits were instituted in the Kandy Court or subsequently. The business was, under the terms of Exhibit A, managed by one of the other partners who lived in Kandy. When the suits were filed, summonses on the partners, including the defendant, were served on the resident partners. It is not shown that they informed the defendant. He did not appear to defend the suits, and decrees *ex parte* were passed against him.

The question which we have to decide is this.—

Assuming that service of notice of the suit on defendant's partner is sufficient service on defendant, and assuming that defendant is entitled to no protection on the score of minority, had the Kandy Court jurisdiction, in the above state of facts, to pass a decree against the defendant's person?

It is conceded that for the present purpose the Kandy Court must be considered to be a foreign Court. The Courts of British India will be guided in this matter by the same principles as are adopted by the Courts of England. The true principle on which the judgments of foreign Courts are enforced in England is that the judgment of a Court of competent jurisdiction over the defendant imposes a duty, or obligation, on the defendant to pay the sum decreed which the English Court is bound to enforce, and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action. [115] *Schibsby* v. *Westenholz* (1). In the case of *Rousillon* v. *Rousillon* (2) Fry, L.J., referring to *Schibsby* v. *Westenholz*(1) and *Copin* v. *Adamson* (3), explained the circumstances which have been held to impose upon the defendant the duty of obeying the decision of a foreign Court. He said "the Courts of this country consider the defendant bound where he "is a subject of the foreign country in which the judgment has been "obtained ; where he was resident in the foreign country when the action "began ; where the defendant in the character of plaintiff has selected the "*forum* in which he is afterwards sued ; where he has voluntarily appear- "ed ; where he has contracted to submit himself to the *forum* in which "the judgment was obtained, and, possibly if *Becquet* v. *Mac Carthy* (4)

(1) L.R. 6 Q.B. 155, 159.
(2) 14 Ch. D. 351, 370, 371.
(3) L.R. 9 Ex. 345.
(4) 2 B. & Ad. 951.

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" be right, where the defendant has real estate within the foreign jurisdic-
" tion, in respect of which the cause of action arose whilst he was within
" that jurisdiction."

If these tests are adopted in the present case, it will be seen that not one of them applies. It is, however, urged that the law as to the authority to be ascribed to foreign judgments is in course of development by means of judicial legislation; and we are asked, on the analogy of *Becquet* v. *MacCarthy* (1), to hold that the defendant by carrying on business through his partners at Kandy should be regarded as constructively resident there, and as having impliedly bound himself to submit to the jurisdiction of the Court under the protection of which his business was being carried on. We do not think that the current of decided cases will justify us in going so far. In *Becquet* v. *MacCarthy* (1) the defendant still held, at the time of the suit, a public office in the colony in which he was sued, and the cause of action arose out of or was connected with it. His duties required him to be present in the colony, and, therefore, amenable to the jurisdiction of its Courts. It was on this ground that he was held to be constructively present in the colony, though, in fact, temporarily absent. This case was stated in *Don* v. *Lippmann* (2) " to go to the verge of the law, " and the Privy Council in the recent case of *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (3) were of the same opinion, and stated that, if the case could not have been distinguished by the said special features [116] from the case of any absent foreigner, who, at some previous time, might have served the Colonial Government, they would have regarded the case as wrongly decided. In the present case there was no obligation on the defendant to reside in Kandy, nor did he do so except for very short periods. The business was carried on by a resident partner who, by the fact of his residence, was liable to the colonial jurisdiction, but we are unable to find any ground for holding that the defendant was constructively resident, or at the time of the suit present within the jurisdiction of the Kandy Court. Nor does the possession by the defendant of some immoveable property in Kandy give that Court jurisdiction over him in matters of contract like the present, for in *Schibsby* v. *Westenholz* (4) it was observed: "We doubt very much whether the possession of pro-
" perty, locally situated in that country and protected by its laws, does
" afford such a ground. It should rather seem that, while every tribunal
" may very properly execute process against the property within its juris-
" diction, the existence of such property, which may be very small, affords
" no sufficient ground for imposing on the foreign owner of that property
" a duty or obligation to fulfil the judgment." The general law is laid down very clearly by the Privy Council in the case of *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (3) in these words: "All jurisdiction is properly terri-
" torial and *extra territorium jus dicenti, impune non paretur*. Territorial
" jurisdiction attaches (with special exceptions) upon all persons either
" permanently or temporarily resident within the territory while they
" are within it; but it does not follow them after they have withdrawn
" from it, and when they are living in another independent country.
" It exists always as to land within the territory, and it may be exercised
" over moveables within the territory; and, in questions of status or succes-
" sion governed by domicil, it may exist as to persons domiciled, or who
" when living were domiciled, within the territory. As between different

(1) 2 B. & Ad., 951. (2) 5 Cl. & F., 1. (3) 21 I.A. 171 (186).
(4) L. R. 6 Q. B. 155 (159).

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"provinces under one Sovereignty (*e.g.*, under the Roman Empire) the "legislation of the Sovereign may distribute and regulate jurisdiction; "but no territorial legislation can give jurisdiction which any foreign Court "ought to recognise against foreigners, who owe no allegiance or obedience "to the power which so legislates.

[117] "In a personal action, to which none of these causes of juris-"diction apply, a decree pronounced *in absentem* by a foreign Court to "the jurisdiction of which the defendant has not in any way submitted "himself is by international law an absolute nullity. He is under no "obligation of any kind to obey it; and it must be regarded as a mere "nullity by the Courts of every nation, except (when authorized by special "local legislation) in the country of the *forum* by which it was pronounced.

"These are doctrines laid down by all the leading authorities on inter-"national law; among others, by Story (*Conflict of Laws*, 2nd edition, "Sections 546, 549, 553, 554, 556, 586, and by Chancellor Kent (*Commenta-"ries*, vol. I, p. 284, note *c* 10th edition), and no exception is made to them "in favour of the exercise of jurisdiction against a defendant not otherwise "subject to it, by the Courts of the country in which the cause of action "arose, or (in cases of contract) by the Courts of the *locus solutionis*. In "those cases, as well as all others, when the action is personal, the Courts "of the country in which a defendant resides have power, and they "ought to be resorted to, to do justice."

We do not think that there are any special circumstances in the present case to take it out of the general rule that the plaintiff must sue in the Court to which the defendant is subject at the time of the suit—a rule which is stated by Sir Robert Phillimore (*International Law*, vol. 4, Section 891), and by the Privy Council in the case already quoted "to lie at the root of all international and of most domestic jurisprudence on this matter." That was the course which the plaintiff in this case ought to have followed, if he desired a remedy against the defendant personally.

On the ground that the Kandy Court had no jurisdiction over the defendant, the Lower Appellate Court rightly dismissed the suit. We, therefore, confirm the decree of that Court and dismiss this second appeal with costs.

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**20 M. 118 (F.B.)=7 M.L.J. 52.**

## [118] APPELLATE CIVIL—FULL BENCH.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Shephard, Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

KADAR HUSSAIN (*Plaintiff*), *Appellant v.* HUSSAIN SAHEB AND ANOTHER (*Defendants*), *Respondents.**

[5th November and 4th December, 1895 and 2nd October, 1896.]

*Limitation Act—Act XV of* 1877, *Schedule II, Article* 12 (*a*)—*Dispossession.*

Limitation Act, Schedule II, Article 12 (*a*) is not applicable to a case in which dispossession is the cause of action and in which the plaintiff was not a party to, or bound by, the sale:

*Held*, accordingly that a suit brought in 1892 to recover possession of the plaintiff's share of land sold by mistake in execution of a decree against his uncle in 1881, was not barred by limitation.

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* Second Appeal No. 62 of 1895.

[**F.**, 4 L. B.R. 40; **Rel.**, 11 Ind. Cas. 76 (77) = 15 P.R. 1912 = 203 P.L R. 1911; **R.**, 34 C. 811 (**F.B.**) = 5 C.L.J. 696 = 11 C.W.N. 756 = 2 M.L.T. 371; 24 M. L. J. 228 (229) = 13 M.L.T. 95 = (1913) M.W.N. 93; 13 O.C. 297 (301); 14 O.C. 343 (351); **D.**, 24 M.L.J. 619.]

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FULL BENCH.

**20 M. 118 (F.B.) = 7 M.L.J. 52.**

SECOND appeal against the decree of E. C. Rawson, Acting District Judge of Vizagapatam, in appeal suit No. 299 of 1893, reversing the decree of G. Jagannadha Rau, District Munsif of Razam, in original suit No. 4 of 1893.

The plaintiff sued to recover a moiety of certain land which had been sold in November 1881, in execution of a decree in original suit No. 290 of 1878, on the file of the District Munsif of Vizianagaram.

The District Munsif passed a decree for plaintiff, but his decree was reversed on appeal by the District Judge, who held that the suit was barred by limitation.

The plaintiff preferred this second appeal which came on for hearing before Collins, C. J., and Parker, J., who made the following order of reference to the Full Bench :—

ORDER OF THE REFERENCE TO FULL BENCH.—The following are the facts which give rise to this reference :—

Plaintiff's paternal uncle Dada Miyya owned half an Inam land, and plaintiff's father owned the other half. Dada Miyya mortgaged his half to defendant's father in 1870. Defendant's father obtained a decree upon this mortgage in suit No. 290 of 1878, and the property mortgaged was ordered to be sold. The sale took place in November 1881, but by some mistake the whole **[119]** land was sold instead of Dada Miyya's half share. Defendant's father purchased the land and was put in possession. Plaintiff brought this suit on November 25th, 1892, to recover possession of his half share.

The District Judge on the strength of the Ruling in *Suryanna* v. *Durgi* (1), held that the suit was governed by Article 12 (*a*) of the Limitation Act and that the suit was barred.

There are however various decisions in which it has been held that Article 12 of the Limitation Act does not apply to suits in which the plaintiff was not a party to, and not bound by, the sale sought to be set aside. See *Sadagopa* v. *Jamuna Bhai* (2), *Haji* v. *Atharaman* (3), (which was a decision by the same Bench) ; *Nilakandan* v. *Thandamma* (4), *Nathu* v. *Badri Das* (5), *Parekh Ranchor* v. *Bai Vakhat* (6) and *Vishnu Keshav* v. *Ramchandra Bhaskar* (7).

The ground of decision appears to be that Article 12 is inapplicable to suits in which dispossession is the cause of action, since dispossession may not have taken place till some time after the confirmation of the sale.

The decision in *Suryanna* v. *Durgi* (1) has been recently doubted by a Bench of this Court in *Narasimha Naidu* v. *Ramasami* (8).

The question referred to the Full Bench is whether Article 12 (*a*) of the second Schedule of the Limitation Act is applicable to a case in which dispossession is the cause of action and in which plaintiff was not a party to, or bound by, the sale.

The reference came on for hearing before the Full Bench.

*R. Subramania Ayyar* for appellant, argued that *Suryanna* v. *Durgi* (1) was wrongly decided and referred to *Narasimah Naidu* v. *Ramasami* (8).

*Ramachandra Rau Saheb* for respondent, contended that when a man knows that his property was put up for sale and sold in execution of

(1) 7 M. 258. (2) 5 M. 54. (3) 7 M. 512. (4) 9 M. 460.
(5) 5 A. 614. (6) 11 B. 119. (7) 11 B. 130. (8) 18 M. 478.

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a decree of Court, he ought to object before the sale is confirmed, and accordingly that, in the absence of proof of fraud, whereby the confirmation of the sale was concealed from the [120] plaintiff as was found to be the case in *Parekh Ranchor* v. *Bai Vakhat*(1), the plaintiff was bound by the one year's rule.

The Full Bench (Collins, C.J., Shephard, Subramania Ayyar and Davies, JJ.) delivered the following judgment.

## JUDGMENT.

In the circumstances stated we think there can be no doubt that Article 12 (*a*) of the second schedule of the Limitation Act cannot properly be applied to the suit brought by the plaintiff.

Whatever was the intention of the parties who took part in the execution sale, the transaction could not affect the title of the plaintiff, and therefore it was not necessary for him to have the sale set aside.

We cannot agree with the decision in *Suryanna* v. *Durgi* (2) which was also a case of a sale in execution of a decree.

[After the delivery of the above judgment the decree of the District Court was set aside, and the appeal was remanded to be disposed of on the merits.]

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**20 M. 120.**

## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.*

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Rangayya Chettiar (*Plaintiff*), *Appellant v.* Parthasarathi Naicker and others (*Defendants Nos.* 1 *to* 7), *Respondents.**
[26th March, 1896.]

*Mortgage—Decree on first mortgage a puisne mortgagee, not being joined—Purchase of mortgaged property by decree-holder for inadequate price—Right of puisne mortgagee —Improvements—Interest.*

A mortgaged land to B and then to C. B sued on his mortgage and obtained a decree for sale without joining as defendant C, of whose mortgage he had notice; D the son of the decree-holder became the purchaser in execution and improved the land at a considerable cost. C now sued the sons and representatives of A and B (both deceased), on his mortgage and sought a decree for sale:

*Held*, (1) that the plaintiff was entitled to a decree for sale subject to the right of the representatives of B, if the purchaser did not elect to redeem;

[121] (2) that the purchaser was not entitled to allowances for improvements;

(3) that the plaintiff was entitled to interest at the agreed rate to the date of decree.

[**F.**, 31 M. 425=18 M.L.J. 298=3 M.L.T. 397; **R.**, 30 C. 599 (**F.B.**); 11 C.P.L.R. 75; 12 C.P.L.R. 125; 21 M.L.J. 213=9 M.L.T. 431 and 499=(1911) 1 M.W.N. 165 (170); 1 O.C. 53; 1 O.C. 105; **Expl.**, 24 M. 171=10 M.L.J. 347; **Expl. & D.**, 10 Ind. Cas. 83=14 Ind. Cas. 449 (453)=22 M.L.J. 129=10 M.L.T. 544; **D.**, 26 M. 537.]

Appeal against the decree of T. Ramasami Ayyanger, Subordinate Judge of Negapatam, in original suit No. 35 of 1893.

Suit to recover Rs. 7,992, being principal and interest due on a hypothecation bond, dated 7th December 1880, and executed by the father

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* Appeal No. 121 of 1895.

(1) 11 B. 119.

(2) 7 M. 258.

(deceased) of defendants Nos. 1 and 2 in favour of the plaintiff. The mortgagor had previously mortgaged the land to one Subbarayar the father (deceased) of defendants Nos. 3—6 to secure Rs. 12,000 under mortgage deed, dated 29th August 1878.

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Original suit No. 21 of 1884 was brought on the mortgage of 1878, and a decree for Rs. 18,896-9-9 was obtained, in execution of which the land was brought to sale and it was purchased by defendant No. 3 for Rs. 1,300. The purchaser was placed in possession on 23rd January 1886.

Plaintiff's case was that Subbarayar who had notice of his mortgage from the date of its execution not having impleaded him as a party to original suit No. 21 of 1884, he was now entitled to enforce his charge against the property purchased by the third defendant in execution of the decree. He alleged that the property was sufficient for payment of both debts, and he now sought a decree for payment by the defendants of the debt due to him, or for the sale of the mortgaged property in satisfaction of it. The Subordinate Judge said:—"In the village No. 2, plaintiff "claims the liability of 13 mahs and $36\frac{3}{4}$ kulies as the remaining extent "was sold away in Court sale in satisfaction of a prior mortgage held by "one Alamelu Ammal. The entire land in the village No. 3 and 1 mah "and $84\frac{1}{2}$, $\frac{1}{32}$ kulies in the village No. 5 were sold for arrears of revenue. "The whole extent in the village No. 6 was sold by the mortgagor for "Rs. 3,000 which plaintiff received in part liquidation of his debt. These "three items of land are not therefore sought to be held liable to plaintiff's "claim."

It was contended by the third defendant that neither he nor his father had notice of the plaintiff's mortgage; that the property other than what was bought by him was sufficient to satisfy the plaintiff's claim; that at the sale held in execution of the decree in suit No. 21 of 1884, no one came forward to bid higher than Rs. 1,300 for which he purchased; and that a sum of Rs. 4,300 [122] was expended by him upon the improvement of the land after his purchase. The Subordinate Judge said:—"It is further contended that the land referred to "in Schedule No. 1 appended to the statement of the third defendant "having been bought by him at a revenue sale, the same cannot be rendered liable to plaintiff's claim; that the land in the village No. 6 was "worth Rs. 4,000, and the plaintiff was not justified in consenting to the "sale of it for Rs. 3,000; that 1 mah and 80 kulies in the village No. 5 "worth Rs. 75 has been purchased by the plaintiff for a small value; "which was neither included in the plaint, nor its price deducted from "the amount of the mortgage; and that he has also acted similarly in respect of the land in the village No. 3. It is added that third defendant "has no objection to 4 velies, 8 mahs, 16 kulies and 8 cents in the village "No. 1 being sold for plaintiff's mortgage debt."

It was found, *inter alia*, that the plaintiff in the suit of 1884 had notice of the plaintiff's mortgage; that the property purchased by defendant No. 3 was at the date of his purchase worth Rs. 35,000, and that the purchaser had improved it at a cost of Rs. 4,300. A decree was passed as follows:—

"This Court doth order and decree that unless defendants 1 and 2 pay "into Court within six months from this date the sum sued for Rs. 7,992-1-0 and costs Rs. 588, the lands hypothecated to plaintiff and specified "below with the exception of the land in the villages of Kothamangalam "and Nanakadu Vadapathi included in the third defendant's father's "mortgage and in the purchase made by the third defendant in revenue

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"sale, be sold first and the sale proceeds applied towards the decree "amount, that then for the balance, if any, of the decree amount which "may remain unpaid after the said sale, the property comprised in the third "defendant's father's mortgage be sold unless the defendants 3 to 6 pay "that balance into Court within three months from the date of the first "sale; that out of the sale proceeds defendants 3 to 6 be paid the amount "decreed to them in original suit No. 21 of 1884 and costs and "further interest as provided therein until January 1886 when they "entered into possession of the land purchased by third defendant "in execution together with costs of execution, all to be ascertained in "the execution of this decree and Rs. 4,300 the cost of improve-"ments made to the land by third defendant, that the balance, if "[123]any, be taken in satisfaction of this decree, that if, at the latter sale, "the property be not bid for more than the amount due to defendants 3 "to 6 as stated above the sale shall be stopped and the defendants 3 to 6 "should by virtue of auction purchase hold the property and plaintiff's "claim against that property shall stand dismissed, and that further in-"terest under the decree in original suit No. 21 of 1884 subsequent to "January 1886, be disallowed as defendants 3 to 6 have enjoyed the land."

"This Court doth further order and decree that plaintiff having ob-"tained large amount for interest his claim for further interest be disallow-"ed; that defendants do bear their own costs; and that no direction "be given for taking an account of what is due to third defendant under "the decree subsequent to January 1886, as the profits of the land after "deducting the cultivation expenses and kist would, according to the evi-"dence produced in this case, have been sufficient only to meet the third "defendant's claim for further interest."

The plaintiff preferred this appeal.

*Rajagopala Ayyar*, for appellant.

*Sankaran Nayar*, for respondents.

## JUDGMENT.

It is contended on the respondents' part that the suit ought to have been dismissed, the plaint not being properly framed. It is said that the plaintiff ought, as second mortgagee, to have sued to redeem, or at least prayed for a sale subject to the first mortgage. The first mortgagee having purchased the equity of redemption, it was open to the second mortgagee to ask for the sale of the property and so give the purchaser an opportunity of redeeming him. It is unnecessary that he should expressly ask for the sale to be made subject to the prior incumbrance. In the nature of things no other sale could be made. We think the decree, on the whole, gives full effect to the rights of the parties, inasmuch as it allows the first mortgagee who has purchased to redeem, if he wishes to do so. On the other hand, the decree makes the sale subject to the rights of the first mortgagee.

The claim for alleged improvements said to have been effected by the first mortgagee since his purchase cannot, we think, be allowed. In this respect he is in no better position than the mortgagor himself who may choose to spend money on his property. We cannot accede to the view that the improvements were made by the purchaser in the character of mortgagee, for in that [124] capacity he is not shown to have been entitled to possession. The decree must be varied in that respect.

We can see no reason why the plaintiff should not be entitled to the interest payable under his mortgage. Interest at the contract rate must

be allowed up to date of decree of the Subordinate Judge and from that date at 6 per cent. The decree must also be amended by directing that any surplus after paying both mortgages be paid to the defendants 3 to 6.

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The memorandum of objections is disallowed with costs.

Respondents must pay appellant's costs of appeal.

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20 M. 124.

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.*

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KRISHNA PATTER (*Petitioner*), *Appellant v.* SRINIVASA PATTER (*Counter-petitioner*), *Respondent.**
[30th October and 11th November, 1896.]

*Mortgage—Malabar Kanom—Redemption — Improvements—Depreciation of, between decree and date of redemption.*

A decree for the redemption of a kanom in Malabar was passed in December 1894 when there were on the land improvements in the form of trees, &c., to the value of Rs. 1,429. Within the six months limited by the decree for redemption the mortgagor applied for execution, and it appeared that the value of improvements had diminished by the loss of trees to the value of Rs. 157. The loss was the result of want of water and was not attributable to neglect on the part of the mortgagee.

*Held*, that the loss should fall on the mortgagee.

[R., 24 M. 47 (F.B).]

APPEAL against the order of the District Judge of South Malabar, in civil miscellaneous appeal No. 49 of 1895, reversing the order of A. Annasami Ayyar, District Munsif of Themmalapuram, in execution petition No. 211 of 1895.

This was an application in execution of a redemption decree. At the time of the decree on the 4th December 1894, improvements to the value of Rs. 1,429-11-3 were found payable to the mortgagee by the mortgagor, who was allowed six months within which to [125] redeem after paying for the improvements and the mortgage amount. The mortgagor applied for execution on 3rd April 1895 and stated that mortgagee had done damage to the improvements since the date of decree. It was found that trees to the value of Rs. 157-14-3 had withered since the date of decree owing to want of water. There was no proof that the mortgagee was responsible for the loss, and it was found by the Courts to have been caused by *vis major*. The question then was, as stated by the District Judge, who was to bear the loss, the mortgagee, as being still in possession because the mortgage money and compensation for improvements had not been paid or the mortgagor who had the right to possession under his decree for redemption but delayed to redeem.

The District Munsif held that the loss should fall on the mortgagee. The District Judge was of the contrary opinion and ordered that the mortgagor should pay the sum of Rs. 157-14-3.

The mortgagor preferred this appeal.

*Sundara Ayyar*, for appellant.

*Ryru Nambiar*, for respondent.

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* Appeal against Appellate Order, No. 5 of 1896.

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## JUDGMENT.

On the 4th December 1894 a decree was passed in favour of the appellant enabling him to redeem certain lands mortgaged to the respondent by way of kanom. At the time of the decree improvements to the value of Rs. 1,429-11-3 were on the land. But when, on the 3rd of April 1895, *i.e.*, within the six months' time allowed by the decree for the redemption, the appellant applied for execution, it appeared that of the improvements which had existed at the date of the decree, trees to the value of Rs. 157-14-3 had withered owing to want of water.

The question is whether the appellant is bound to pay to the respondent the said sum of Rs. 157-14-3. It does not appear that the kanom instruments, on which the decree was obtained, contained any agreement as to compensation for improvements. The claim for it rests therefore upon the local custom, and the covenant implied according to that custom is to pay for all 'unexhausted improvements' (Wigram's *Malabar Law and Custom*, page 137). In other words, the basis on which the liability in question stands is, of course, that the mortgagor would, when he redeems, enjoy the benefit of the improvements effected by the mortgagee. Consequently, when no such advantage accrued to the former, he cannot, on principle, be called upon to pay.

[126] Now, can the fact that a valuation of the improvements has been made and embodied in a decree alter the case? It is difficult to see how it can. According to the course of decisions here, it is established that, notwithstanding the passing of a decree for redemption, the relation of mortgagor and mortgagee fully subsists, if the decree be not executed and therefore the right to redeem can be again asserted and enforced, provided it had not been lost by lapse of time or otherwise. Suppose a mortgagor, having obtained a decree for redemption, does not execute it, but allows the property to remain in the hands of the mortgagee for a considerable time and the latter during that period makes more improvements. Surely his right to the value of those cannot be denied, whether the question arises in execution proceedings or in a separate suit; nay, according to *Ramunni* v. *Shanku* (1) even in respect of improvements referred to in a decree which the mortgagor does execute, the mortgagee can, in such execution proceedings, claim a re-valuation if he can show that, since the passing of the decree, the value of the improvements has increased. How then can the mortgagor, with any justice, be held to be disentitled to obtain a reduction of the amount mentioned in the decree if he can prove that any part of the improvements assessed therein, has since ceased to exist? That the final adjustment of the amount of compensation must be made with reference to the state of things at the time of the actual redemption, is also shown by the practice followed by the Courts prior to July 1880 according to which the question used to be reserved for execution. The present system of holding an enquiry into the matter before decree, no doubt originated with this Court's Circular order, dated the 14th July 1880 (Weir's Rules of Practice, page 197). But all that the circular lays down is that Courts should, before passing a decree, decide in respect of what improvements the party in possession is up to the date of the decree entitled to compensation; and the amount of compensation. The circular, therefore, does not and cannot affect the right of the mortgagor to ask for a revision of the amount awarded by the decree, if such revision is rendered necessary by events that have occurred since the

(1) 10 M. 367.

decree. Accordingly, if, during execution, improvements as ascertained and awarded by a decree, be not found on the land or were destroyed [127] by the tenant, the Courts have, in acting under Section 244, Civil Procedure Code, been in the habit of ascertaining the amount of the loss and deducting it from the sum originally fixed.

The pleader for the respondent next urged that a loss like that under discussion, if it is not due to any act or default of the mortgagee, should fall on the mortgagor, as the property in the improvements was, at the time of the loss, in him. This assumption about the property being in the mortgagor even before compensation is paid by him, is not only not supported by any authority, but is directly contradicted by the Fifth Report where it is stated, "The buildings and plantations are in fact the property "of the tenant; and he can mortgage or sell them, in the same manner, "as the jenmkar mortgages or sells his own property in the land." (Higginbotham's edition, Vol. II, p. 82). Moreover, if the above contention were well founded, a person, who mortgages by way of kanom, would be liable for every improvement once effected, though it had disappeared before the decree. But no one has as yet ventured to put forward such a manifestly unreasonable claim. In support of the above contention on behalf of the respondent, it was urged that the holder of a kanom is, by the usage of the district, prohibited from cutting, without the mortgagor's consent, trees on the land, though they had been planted and grown by the mortgagee himself; and *Changaram* v. *Chirutha* (1) was relied on. Without entering into the question whether the actual decision there is sound or not, which we are not called upon to consider, we may say that it is quite clear that the case cannot be treated as establishing the proposition for which it was cited. For, curiously enough, the District Munsif's judgment opened with the observation:—"It is now admitted that the trees belonged to the first defend-"ant having been planted by him as kanom tenant of the plaintiff," and referring to this observation, Best, J., pointed out that the District Munsif's opinion that the kanom tenant was not entitled to cut the trees without the permission of the plaintiff—the landlord—was open to question.

In the present case no evidence was adduced as to the alleged custom prohibiting a kanom tenant from removing trees which had been planted by him. We cannot, therefore, express any opinion as to whether such a custom exists or not. But, assuming for [128] argument's sake that a usage of the kind does prevail, that does not necessarily prove that the property in improvements, not yet paid for, vests in the mortgagor. For the alleged usage would be perfectly consistent with the view that in such a case the property is in the mortgagee until the payment of compensation; the restriction on his power to remove such improvements as trees beings explained as imposed on grounds of policy, similar to that which underlie the provision in Section 63 of the Transfer of Property Act relating to an accession, made at the expense of the mortgagee to preserve the property from destruction, &c., but which accession is not capable of being separately possessed or enjoyed by the mortgagee. Considering that the mortgagor in cases like the present is bound to pay compensation for improvements even when the contract between the parties is silent on the point, the above view as to the relative rights of the parties would seem to be a

(1) Civil Revision petition No. 445 of 1895 unreported.

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more reasonable interpretation of the alleged local usage than that suggested on behalf of the respondent.

The conclusion, therefore, to be arrived at appears clearly to be that the appellant is bound to pay only for such improvements as at the time of the redemption, are on the land in a reasonably good condition (compare *Gubbins* v. *Creed* (1), and therefore he is not liable for the amount in dispute. To hold otherwise would certainly tend to incline mortgagees to neglect between the date of the decree and that of its execution, the duty of properly looking after the improvements, compensation for which has been assessed, and in some cases even to destroy them to the injury of the mortgagors.

The order of the Lower Appellate Court must be reversed and that of the District Munsif restored.

The respondent will pay the appellant's costs in this and in the Lower Appellate Court.

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**20 M. 129 (F.B.) = 7 M.L.J. 102.**

## [129] APPELLATE CIVIL—FULL BENCH.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Shephard, Mr. Justice Subramania Ayyar, and Mr. Justice Davies.*

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VASUDEVAN AND OTHERS (*Plaintiffs*), *Appellants v.* SANKARAN AND OTHERS (*Defendants Nos.* 1 *to* 14 *and* 17 *and* 18), *Respondents.** [23rd April 1896 and 27th January, 1897.]

*Malabar law—Decree against karnavan binding on tarwad.*

A decree in a suit in which the karnavan of a Nambudri illom or a Marumakkatayam tarwad is, in his representative capacity, joined as a defendant and which he honestly defends is binding on the other members of the family not actually made parties.

[F., 27 M. 375; 8 Ind. Cas. 435 = 9 M.L.T. 111; R., 24 M. 658; 29 M. 390 (F.B.) = 16 M.L.J. 307 = 1 M.L.T. 183; 17 Ind. Cas. 473 (475) = 23 M.L.J. 706 (709) = 12 M.L.T. 585 = (1913) M.W.N. 79 (81); 21 T.L.R. 239.]

SECOND appeal against the decree of R. S. Benson, District Judge of South Malabar, in appeal suit No. 343 of 1893, confirming the decree of A. N. Anantarama Ayyar, District Munsif of Angadipurm, in original suit No. 673 of 1892.

Suit to recover certain land of which defendant No. 18 was in possession. The land was formerly the property of a Nambudri illom which had become extinct. A conflict as to the right of succession to its property arose between the illom to which the plaintiffs belonged and of which defendants Nos. 15 and 16 were respectively, the karnavan and the senior anandravan on the one hand, and that of which defendant No. 17 was karnavan and defendants Nos. 1 to 14 were members on the other hand. In 1876 the karnavan of the plaintiffs' illom sued the karnavan and senior anandravan of the rival illom for partition of the properties in dispute, and in a subsequent suit of 1878 against the same parties he obtained a decree for possession of the land now in question. The junior members of the

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* Second Appeal No. 501 of 1895.

(1) 2 Sch. & Lef. 225.

unsuccessful defendants' illom brought a suit in 1877 against the decree-holder and his senior anandravan to recover the land now in question and for a declaration of their right of succession to the property of the extinct illom. In that suit the present sixteenth defendant was described as the karnavan and manager of the illom, and the present plaintiffs Nos. 1 and 2, [130] who were then minors, were sued by him as their guardian *ad litem.* That suit was determined on second appeal in favour of the then plaintiffs. See *Shankaran* v. *Kesavan* (1). The present plaintiffs now sued to recover the land, alleging that they were not parties to that suit and that the decree was not binding on them.

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The District Munsif held that the question was *res judicata* and dismissed the suit, and his decree was affirmed on appeal by the District Judge.

The plaintiffs preferred this second appeal.

This second appeal having come on for hearing before Mr. Justice Shephard and Mr. Justice Subramania Ayyar, their Lordships made the following order of reference to Full Bench :—

ORDER OF REFERENCE TO FULL BENCH.

Vakils on both sides agreeing to this form of question, we refer it to a Full Bench having regard to the importance of the matter and the conflict of decisions : Whether the decree, made in a suit in which the karnavan of a Nambudri illom or a Marumakkatayam tarwad is, in his representative capacity, joined as a defendant and which he honestly defends, is binding on the other members of the family not actually made parties?

The case came on for hearing before the Full Bench consisting of COLLINS, C.J., SHEPHARD, SUBRAMANIA AYYER and DAVIES, JJ.

Mr. *J. Adam* and *Sankaran Nayar*, for appellants.

*Krishnasami Ayyar*, for respondents.

*Sankaran Nayar*, for appellants.

*Ittiachan* v. *Velappan* (2) decides that a decree against a karnavan as such alone, is not binding on the tarwad see *Sri Devi* v. *Kelu Eradi* (3). *Subramanyan* v. *Gopala* (4). In *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi* (5), Kernan, J., upholds the contention that the decree is binding. These decisions proceed on a consideration of Civil Procedure Code, Section 13, Explanation 5, relating to cases where a private right is claimed for the plaintiff in common with others. The position of a karnavan is defined in *Kombi* v. *Lakshmi* (6); see also [131] *Kalliyani* v. *Narayana* (7). A karnavan cannot alienate land directly, and he cannot do it indirectly by suffering a decree to be passed against him. He is not the agent of the family to make alienations. In each case he must have actual authority. Supposing a suit is brought by a creditor against a karnavan for a debt alleged to be due by a tarwad and a decree is passed and tarwad property is attached, it is open to the Judge to go behind the decree and see if it is binding on the property. Where the debt is contracted for the benefit of the tarwad the consent of the anandravans is implied *Vasudeva* v. *Narayana* (8). In that case the decree was passed for land in possession of the karnavan, who alleged that it belonged to this tarwad. The tarwad having been dispossessed in execution the junior

(1) 15 M. 6. (2) 8 M. 484. (3) 10 M. 79. (4) 10 M. 223.
(5) 2 M. 328. (6) 5 M. 201. (7) 9 M. 266. (8) 6 M. 121 (124).

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members were permitted to sue. In *Thenju* v. *Chimmu* (1) the karnavan offered to be bound by an oath as to whether or not the decree so obtained was binding on the tarwad. *Kombi* v. *Lakshmi* (2) was the case of a defendant. By analogy with the law relating to members of a numerous partnership, all the members of a tarwad should be served. The question referred should, on the principles now established, be answered in the negative.

*Krishnasami Ayyar*, for respondent.

It is not open to the plaintiffs to re-open the suit. Assuming, of course, that the karnavan has been guilty of no fraud, the decree against him cannot be impeached. The claim in *Ittiachan* v. *Velappan* (3) raised a question of the character of the debt, and the plaintiffs sought a declaration that it was not binding on them the decision in that case was followed in *Subramanyan* v. *Gopala* (4) and also in *Sri Devi* v. *Kelu Eradi* (5) where the limitations of the rule are explained. The result of the authorities is that where a suit is brought as here against a karnavan in his capacity as such the other members are bound by the decree is binding unless fraud is proved. Under Hindu Law one member of the family could only impugn the decree to the extent of his share. Here one member seeks to set aside the decree, not in part but in its entirety. The distinction between cases where the karnavan is plaintiff or defendant is pointed out in *Vasudeva* v. *Naraayna* (6) [132] see also *Cockburn* v. *Thompson* (7). Under Civil Procedure Code, Section 13, persons who were represented by parties to the former action may be bound by the decree. A suit on beahlf of a minor brought by his guardian is really a suit by a guardian representing the minor, but the adjudication is binding as against the minor. Compare *Jogendro Deb Roy Kut* v. *Funindro Deb Roy Kut* (8) which was a case of Hindu law. The present case is stronger one, because the karnavan has larger powers than the managing member of a Hindu family, *Narayan Gop Habbu* v. *Pandurang Ganu* (9), *Gansavant Bal Savant* v. *Narayan Dhond Savant* (10); see also *Harrison* v. *Stewardson* (11), 1 Daniell's Chancery Practice, Chapter IV, Section 1. Section 13, Explanation 5, is not confined to cases under Section 30. See *Madhavan* v. *Keshaven* (12), *Chandu* v. *Kunhamed* (13), *Latchanna* v. *Saravayya* (14). Hukum Chand on *Res judicata*, paragraph 89. Where it is an indivisible right, one party represents the others. It is otherwise where the right is divisible. *Hazir Gazi* v. *Sonamonee Dassee* (15). *De Hart* v. *Stevenson* (16). If such a decree is not final, further suits will be instituted on the chance of the different conclusion being arrived at. *Dawan Singh* v. *Mahip Singh* (17).

Mr. *J. Adam* in reply.

*Moidin Kutti* v. *Krishnan* (18) re-affirms *Ittiachan* v. *Velappan* (3) and to disturb the rule there laid down and to revert to what may have been the law before, would disturb many rights and give rise to much litigation. The possession for which the appellants contend involves no hardship, as persons desirous of binding a tarwad can always adopt the procedure provided by Section 30, see *Komappan Nambiar* v. *Ukkaran Nambiar* (19).

(1) 7 M. 413. (2) 5 M. 201. (3) 8 M. 484. (4) 10 M. 223. (5) 10 M. 79. (6) 6 M. 121 (124). (7) 16 Ves. 321. (8) 14 M.I.A. 367. (9) 5 B. 685. (10) 7 B. 467. (11) 2 Hare 530 (12) 11 M. 191. (13) 14 M. 324. (14) 18 M. 164. (15) 6 C. 31. (16) 1 Q.B.D. 313. (17) 10 A. 425 (441). (18) 10 M. 322. (19) 17 M. 214.

## JUDGMENT OF THE FULL BENCH.

COLLINS, C.J.—The question referred to the Full Bench is, whether the decree, made in a suit in which the karnavan of a Nambudri illom or a Marumakkatayam tarwad is, in his representative capacity, joined as a defendant and which he honestly defends, is binding on the other members of the family not actually made parties. I take it that the word 'honestly' means that the karnavan acted in good faith and in what he believed to [133] be the interest of the tarwad. The karnavan of a Malabar tarwad is, except under certain circumstances, the eldest male member of the tarwad; in him is vested actually all the property moveable and immoveable belonging to the tarwad; he manages the property of the tarwad and can invest the money of the tarwad either on loans or other security as he may think fit. He can also grant the land on kanom or on otti mortgage. No member of the tarwad can call for an account of the income, nor can a suit be maintained against him for an account of the tarwad property in the absence of fraud on his part. He can sue in his own name for the purpose of recovering or protecting the property of the tarwad, and none of his acts in relation to the above matters can be questioned, provided he has acted in good faith. He is restrained, it is true, from alienating the lands of the tarwad in his capacity as manager except in certain instances, *e.g.*, when a decree is in course of execution against the tarwad property and against the karnavan, and he alienates such property in good faith there being no other means available, and in the case where it is absolutely necessary to do so to pay arrears of revenue. The karnavan is not a mere trustee of the property of the tarwad; he is the natural guardian of every member within the family, and it was well said by Mr. Holloway in appeal suit No. 120 of 1862 (Malabar) "a Malabar family speaks through its head the karnavan, and "in Courts of Justice except in antagonism to that head can speak in no "other way." It appears that, during the time Holloway, J., was in the High Court, the proposition that the members of the tarwad were bound by the acts of the karnavan in cases in which he sued or was sued in his representative capacity was never seriously disputed, and the cases cited at the bar do not appear to me to overrule the proposition. I would adopt the view of the powers of the karnavan as laid down in *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi* (1), and there are many cases quoted by Mr. Wigram in his work on Malabar Law and Custom which support the proposition.

I would hold, therefore, that when a karnavan sues or is sued in his representative capacity and acts, in the terms of the order of reference, 'honestly,' the other members of the tarwad are bound [134] by the decision. I answer, therefore, the order of reference to the Full Bench in the affirmative.

The sections of the Code of Civil Procedure cited in argument do not affect the matter one way or the other.

SHEPHARD, J.—The question raised by the reference is one of considerable importance. Since 1880, it has constantly been discussed in this Court. Different views have been propounded, and it would not be easy to reconcile all the decisions. I propose first to examine these decisions and afterwards to consider the question from other aspects, and also with reference to the arguments which are urged against the admission of the

(1) 2 M. 328.

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principle that a karnavan can properly represent his tarwad in suits professedly brought by, or against, the tarwad.

In *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi* (1), the senior member of an illom had been sued as such for the recovery of land alleged by him to belong to the illom. A decree having been passed against him, a junior member of the illom, alleging fraud, sued for a declaration with regard to the same land as against the plaintiff in the first suit. It was held that the junior was properly represented by his senior in the first suit, and that therefore having failed to prove fraud, he could not succeed in the second suit. In *Kombi* v. *Lakshmi* (2) a decree for money had been obtained against the karnavan and a suit was brought by the anandravan to set aside the sale in execution of the decree. It does not seem to have been proved that the karnavan was sued or sought to be made liable otherwise than in his personal capacity. The Court distinguished the case of a debt from the case of land such as was under consideration in *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi* (1). It held that the junior members were entitled to a decree on the creditor failing to prove that the debt was properly incurred for the purposes of the tarwad. It was in effect said that if the creditor intended to make the tarwad liable he ought to have made them parties or applied under Section 30 of the Code.

In *Vasudeva* v. *Narayana* (3) Mr. Justice Innes who was a party to the last decision, expresses the same view again. That was a case in which a member of an illom, apparently the eldest, was [135] defeated in a suit brought against him for redemption of certain land. In the second suit brought by his brother to recover the same land, it was held by Innes, J., that, although no fraud was alleged the brother was not bound by the former decree. Mr. Justice Kernan, who had taken part in the judgment in *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi* (1), considered that it was unnecessary to decide the question whether the case of a Malabar tarwad was an exception from the ordinary rule that all persons sought to be affected by a suit should be made parties to it. The learned Judges agreed that the case was distinguishable from that in *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi*(1). With all deference, I must say that, assuming that the elder brother in *Vasudeva* v. *Narayana*(3) was sued in his representative capacity, I can see no material distinction between the two cases. The circumstance that, in the earlier case, the plaintiff alleged fraud and left it to be assumed that otherwise he was bound by the decree is suggestive as indicating the opinion entertained by him and his advisers as to the position of the head of a Malabar family. But I do not understand why, because he failed to prove the alleged fraud, he should not have had relief on the simple ground that he was not duly represented in the former suit, if that ground was considered tenable. It appears to me that the judgment in *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi* (1) was clearly intended to show that that ground was not tenable. In *Thenju* v. *Chimmu* (4) the two extreme views are stated : *First*, "a judgment is only binding *inter partes* and the judgment against the karnavan is in no case binding on the anandravans" ; *Second*, "a karnavan is the head and representative of the family, and the judgment against him binds the anandravans unless he was guilty of fraud or collusion." It was not necessary in that case to attempt a reconcilement of the decisions.

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(1) 2 M. 328. (2) 5 M. 201. (3) 6 M. 121. (4) 7 M. 413.

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In *Haji* v. *Atharaman* (1) it apears to have been assumed that a decree against the karnavan for a debt alleged to be the tarwad debt was binding on the tarwad. There was no actual decision. In *Ittiachan* v. *Velappan* (2) the question came before a Full Bench with reference to decrees for debt. The question stated in the **[136]** judgment was as follows :—" Under what circumstances a decree passed against a karnavan of a Malabar tarwad will be binding on the other members of the tarwad who may not have been made parties to the suit, so that a sale in execution will convey the rights of the tarwad in the property sold in execution to a purchaser ?" As might have been expected no definite answer was given to this question. The general effect of the observations made in the first part of the judgment seems to be that, in the opinion of the Court, the admitted practice of treating the karnavan as a sufficient representative of the tarwad was not strictly regular, but that notwithstanding it must be tolerated within certain bounds. In dealing with the particular cases under reference, the Court treated the circumstance that the karnavan had or had not been sued in his representative character as the cardinal point on which to decide whether or not the tarwad was bound by the decree. The next case *Sri Devi* v. *Kelu Eradi* (3) is of importance because, in deciding it, the Court considered the Full Bench decision and acted upon their view of it. At the same time it must be said that, having regard to the facts found by the District Judge, the observations made on the general question of the force of decrees against a karnavan were not strictly necessary. The District Judge on appeal held that the karnavan had, in the first suit in which he was impleaded as defendant, fraudulently admitted the plaintiff's title. But the Court decided the case on the ground that apart from fraud the anandravans were entitled, notwithstanding the decree, to have the question of title examined and to show that the decree was erroneous in point of fact. They considered that they were precluded by the Full Bench decision from holding that the anandravans were bound by the decree against their karnavan unless they proved *mala fides* on his part.

The next case *Subramanyan* v. *Gopala* (4) was heard by a Court composed of the same Judges as those who took part in the last cited case. This case differs from the former cases in the circumstance that the manager of the family had figured as plaintiff in the former suit. It was found that she had sued not on her own account, but on behalf of the tarwad and that she had contested the suit honestly and with due diligence. On this finding returned in answer to questions sent down by the Court on the **[137]** first hearing of the second appeal, the Court dismissed the suit brought by the junior members of the tarwad, founding their judgment on the fact that the manager had been the plaintiff in the first suit and thus distinguishing the case from *Sri Devi* v. *Kelu Eradi* (3).

Some other cases were cited, but they have no immediate bearing on the point now under discussion. One negative proposition is clearly established by the cases to which I have referred—a decree made against a karnavan is clearly not binding on the tarwad, unless he sued or was sued in his representative character. It is also difficult to avoid the admission that the cases justify this further proposition that, in some cases, a decree against the karnavan may be binding on the tarwad and unimpeachable save on the ground of fraud. This limited proposition is admitted in *Subramanyan* v. *Gopala* (4). The distinction there insisted

(1) 7 M. 512. (2) 8 M. 484. (3) 10 M. 79. (4) 10 M. 223.

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upon I fail to understand or appreciate. If the tarwad may be adequately represented by their karnavan in litigation promoted by him, I cannot see why this may not equally be represented by him in proceedings which are directed against the tarwad. The distinction between the case of the karnavan sued for debt and the karnavan sued for property is also, I think, one which cannot be maintained. It is suggested in the case in *Kombi* v. *Lakshmi* (1), but since then does not seem to have been insisted upon. I concede that distinctions founded on the nature of the right or the way in which it comes to be litigated may be material in considering whether the karnavan really did represent the tarwad and honestly represent it ; but otherwise I fail to see how they can be material. There are, it appears to me, only two alternatives. We must either hold that the status of the karnavan has nothing in it to make a decree against him binding on the tarwad, or that, in all cases in which he is sued or sues in his representative character, the tarwad is bound, cases of fraud or collusion only being excepted. Having regard to the authorities already cited, I do not think we are precluded from affirming this latter proposition. The former proposition it would not be easy to reconcile with the Full Bench decision, which alone is binding on us.

**[138]** I will now consider the question apart from the recent cases and with reference to the position of karnavan as understood in Malabar. I believe there can be no doubt that, prior to 1880, the theory that the tarwad was fully represented by the karnavan was universally admitted (see *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi*(2), *Kombi* v. *Lakshmi* (1), Wigram's Malabar Law). It is noteworthy that, as long as Mr. Justice Holloway, who was intimately acquainted with Malabar Law, was in this Court, the theory does not seem to have been questioned. In the Travancore State, I find from a recent judgment of the Court there that it is maintained to the present day (*Narayana* v. *Narayana* (3)). It is unnecessary to repeat at length what has been said in several cases as to the rights and duties of the karnavan. He is the manager of the tarwad property ; he is entitled to possession of it even against anandravans ; he is authorised, subject to certain limitations, to alienate the family property and to pledge the credit of the family. He cannot be removed from office at the instance of the junior members and dispossessed of the family property except on proof of gross maladministration. Apart from this, the junior members have no other claim against him except for maintenance. No claim for division of the property is admissible (*Eravanni Revivarman* v. *Ittapu Revivarman* (4), *Varanakot Narayanan Numburi* v. *Varanakot Narayanan Numburi* (2) ; *Tod* v. *Kunhamod Hajee* (5), *Kannan* v. *Tenju* (6). If the karnavan being so placed with regard to the tarwad, was, for many years prior to 1880, universally regarded as the person through whom the tarwad should speak in Courts of law and was so treated by the Courts, the remaining question is whether the Code of Civil Procedure forbids us to continue to treat him in the same way. This is a question which ought to be argued without reference to considerations of convenience or expediency, which, however, in my opinion, favour the maintenance of the old practice rather than its abolition. The argument used in several of the cases seems to have been that, because the Civil Procedure Code does not provide for the case of karnavans as it does, for instance, for the case of executors,

(1) 5 M. 201. (2) 2 M. 328. (3) 11 Travancore L.R. 112.
(4) 1 M. 153. (5) 3 M. 176. (6) 5 M. 1.

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and does contemplate the joinder of all parties interested in the sub- [139] ject matter of the suit, the anandravans of a tarwad cannot be affected by a decree to which they are not parties either actually or constructively under the provisions of Section 30. The general proposition that all persons intended to be prejudicially affected by a decree ought to be joined as parties to the suit cannot be denied; but there are exceptions from this rule, and the question whether one person represents another is rather a question of substantive law than of procedure. One of the classes of exception consists of the cases of which *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh* (1) is an instance. Another consists of the cases in which the principle is admitted that the female heiress under Hindu Law represents the estate in such a manner that a decree against her in a suit properly framed may bind the reversioner. These exceptions have been allowed and maintained, notwithstanding the provisions of the Civil Procedure Code. The Section of the Code to which we are specially referred are the 30th and the 13th, Explanation V. The 30th Section is of a permissive character. So far as concerns the principle involved there was nothing new in the provision. It had been acted on before the Code of 1877 came into force (*Srikhanti Narayanappa* v. *Indupuram Ramalingam* (2)). If it were shown to have been invoked, in the case of the karnavan and his tarwad, it might be said that a decree against a karnavan could, since the enactment of the Code, be no longer held binding on the tarwad, unless the procedure prescribed by the section were followed. But this is not so, and I do not think it can properly be said that a karnavan and his anandravans have 'the same interest' in a suit brought by, or against, the tarwad. The interest of the former, with his right of management and possession and his obligation to maintain the junior members, is surely not identical with the interest of a junior member, who has a claim for maintenance only. The whole contention in favour of the view that the karnavan represents the tarwad rests on the fact that he is in a position of authority having obligations and duties to perform, for discharge of which superior rights in the tarwad property are conferred upon him. With regard to Section 13, Explanation V, if it has any application to the case of a Malabar tarwad, it rather supports the view that the tarwad may be bound by a decree against the karnavan *bona fide* [140] litigating on its behalf. I am disposed to agree with Kernan, J., in thinking that the explanation refers alike to claims made by a defendant and claims by a plaintiff. The conclusion at which I arrive is that the Code of Civil Procedure does not prevent our giving effect to the theory of the karnavan's representative character. I cannot help thinking that learned Judges have been induced to discountenance the theory on the ground that the interests of the tarwads require that all their members should be joined in suits concerning their property or obligations. It was observed in some of the cases that to allow the karnavan to represent the tarwad in suits would practically amount to allowing him to alienate tarwad property indiscriminately. No doubt, the remedy by suit impeaching the decree against their karnavan on the ground of his fraud or collusion, would not afford the anandravans a complete indemnity against the possible misconduct of the karnavan. But the inconvenience resulting is, I think, more than counterbalanced by the evil consequences, which have resulted from the departure from the old practice. The result has been that, although a man may have obtained a decree for a debt or for property

(1) 6 I. A. 233. (2) 3 M.H.C.R. 226.

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against the karnavan and some of his anandravans, he has been exposed to successive suits by the remaining members of the tarwad. It is always open to some unconsidered infant to re-open the litigation and insist on having the whole question re-tried. The rule of impartibility, which prevails according to Malabar Law, renders the consequences of an omission to join all the members of the tarwad, if they are to be deemed necessary parties, much more serious than it is in a similar case under the ordinary Hindu Law. Whereas, according to the latter, the creditor or the purchaser might, at least, retain, under his decree against the manager, the share of that manager in the family property, in Malabar he is deprived even of that consolation when the Court holds that a junior member of the tarwad may re-open a litigation which has been fairly conducted by his karnavan and is persuaded to upset the former decree. In such a system it is not astonishing that a rule making the karnavan the exclusive representative of the tarwad should find a place.

For these reasons I am of opinion that the question must be answered in the affirmative.

SUBRAMANIA AIYAR, J.—I have also arrived at the same conclusion, and, in my opinion, that is the conclusion to which the **[141]** principle governing the case leads, there being nothing in the Code of Civil Procedure to preclude effect being given to that principle.

The question here really turns upon the peculiar characteristics of a Malabar family and the unique position which its karnavan holds. The family property is not liable to partition, except with the consent of all; the right of the members other than the karnavan being practically limited to claim maintenance and to prevent the karnavan from wasting or improperly alienating the family property; and the title to hold possession of the estate and to receive and expend its income is vested in the karnavan, not by the sufferance of the other members, but of right, which is indefeasible so long as he exercises his functions without injury to the family. Therefore according to the substantive law to which he is subject, a karnavan is necessarily the natural representative of the family in all matters concerning it as between it on the one hand and outsiders on the other.

The question is whether in litigation also, when it concerns the family, a karnavan is not entitled to represent all the other members so as to bring cases like the present within the exception to the general rule requiring all persons materially interested in the subject of a suit to be made parties to it, *viz.*, even those not actually before the Court are bound by the judgment given in a suit, if their interest was sufficiently represented therein. Now it is conceded that, when a karnavan sues on behalf of the family, he fully represents all its other members and an adjudication therein, if there is no fraud or collusion, is binding on the whole family (*Subramanayan* v. *Gopala* (1)). It is obvious that in such cases it is not possible to maintain any other view. For the entire executive authority being exclusively vested in the karnavan, it is not open to the party sued by him to raise any objection to the action on the ground of the non-joinder of the other members, *Byathamma* v. *Avulla* (2). A defendant in that position cannot, in common fairness, be allowed to be sued again and again by each and every member of the family after a suit instituted by a karnavan had been properly tried and adjudicated upon. By parity of reasoning, then, it follows that a karnavan can be sued on

(1) 10 M. 223. (2) 15 M. 19.

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behalf of the family. It is difficult to see how this conclusion can be avoided, [142] unless the argument of the defendant based on the provisions of the Civil Procedure Code were correct.

The argument seems to be that, only when the special procedure prescribed by Section 30 has been adopted, the members of a family not actually parties to the suit are bound by the decision pronounced in it, but not otherwise. Now, it must be remembered that Section 30 provides only for that class of cases in which, owing to the circumstance that the persons interested are too numerous to be all conveniently brought before the Court, and therefore the rigorous application of the general rule as to parties would work injustice, the rule has, as pointed out by the Lord Chancellor in *Mozley* v. *Alston* (1) see also *Richardson* v. *Hastings* (2), been relaxed in comparatively modern times. It has also to be remembered that the representative under that section is constituted and appointed by the Court in the suit. But there are instances where, even though the difficulty with reference to the application of the general rule has nothing to do with the fact that the persons interested are numerous, yet the law does allow, apart from statute, certain persons to prosecute or defend suits in their representative capacity, *e. g.*, Hindu widows with reference to reversioners ; other persons having an estate, analogous to that of a Hindu widow with reference to those entitled to take after such qualified owners, and so on. In the cases last mentioned the limited owners possess the representative capacity to sue or defend by virtue of their position. This, as already shown, is eminently true in the case of a karnavan. Consequently he does not require the aid of Section 30 to be a representative, but has the inherent right to act as such, provided, of course, there is in the particular case no conflict between his own interest and that of the family.

Nor does Section 13, the only other provision relied upon, affect the validity of the conclusion arrived at. If the present case falls within Explanation V, that explanation fully sustains the view taken, since, with all deference to the opinion of Innes, J., in *Vasudeva* v. *Narayana* (3), I think the explanation is certainly applicable to claims by a defendant as well as to those by a plaintiff. But if that explanation does not apply, the case is one not strictly covered by any other part of the section. And, [143] as the section is not exhaustive as to *res judicata*, I think it does not affect the correctness of the view taken here. Therefore, unless there is shown in the words of Jessel, M. R., "fraud or collusion or "anything of that sort or that the Court was cheated into believing that "the case was fairly fought or fairly represented when in point of fact "it was not" (*Commissioners of Sewers of the City of London* v. *Gellatly* (4)), a decision in a suit, defended by a karnavan in his representative capacity, must be held to be binding upon all those represented by him.

The rule governing the present case being thus clear, arguments against it founded on expediency have no force. If it be said that to recognise the right of a karnavan to represent his juniors in litigation would prove detrimental to the welfare of Malabar families, it must be admitted it would be equally so in cases in which a karnavan sues as when he defends. Yet, in the former case, the objection has not been considered good enough to hold that junior members are not bound by a decision obtained in the suit by the karnavan. How then can the argument

(1) 1 Phillips' Reports, 798, 799.
(2) L.J. 13 Ch. 142.
(3) 6 M. 121.
(4) L. R. 3 Ch. D. 616.

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prevail in the latter case? No doubt, in particular instances, it is possible and not improbable that junior members might find themselves unable to establish fraud, collusion or the like on the part of the karnavan. But I have no doubt that the hardship, likely to be so caused, will be small indeed when compared with that which would result from answering the question before us in the negative; since experience shows that, in the large majority of cases, the attempts made to re-open litigation once concluded after real and genuine contest are made by the same parties, the name of persons (possibly of those who had been fully cognizant of and who had acquiesced in the karnavan's management of the previous litigation) who unfortunately, for the successful party, had not been actually impleaded, being used for the promotion of such subsequent suits. No doubt representative litigation of the kind under notice is attended with some degree of difficulty. The difficulty however may, to some extent, be met by a judicious exercise of the discretion vested in the Courts in the matter of adding parties. But the difficulty cannot afford any justification for discarding the principle applicable to such cases. A departure from it, in some of the decisions of this Court which have been fully considered **[144]** by my learned colleague Shephard, J., and which I therefore refrain from discussing, has, I am afraid, tended to foster unjust and vexatious litigation which can, I think, be stopped to a considerable degree by again enforcing the principle accepted and uniformly acted upon up to 1880.

I concur therefore in answering the question referred in the affirmative.

DAVIES, J.—I was at first disposed to adopt the view that all members of the tarwad ought to be impleaded either individually when few in number, or under the provisions of Section 30 of the Code of Civil Procedure when numerous, for the simple reason that this course would have the effect of preventing any further litigation in connexion with the same subject matter.

But now having regard to the representative character which the karnavan undoubtedly holds in all other affairs connected with the tarwad, it seems to me that if we overlooked that character in our Courts of law we should be unjustly derogating from his status.

Moreover, the only litigation that would be possible upon the judicial recognition of his representative character would be confined to actions founded in fraud on his part. The inconvenience caused thereby would, in my opinion, be far less than what would follow from an inflexible rule requiring that in every case in which a tarwad was concerned all its members should be made parties, entailing in nine cases out of ten needless trouble and expense.

I therefore also concur in answering the question in the affirmative.

This second appeal coming on for final disposal, the Court (SHEPHARD and SUBRAMANIA AYYAR, JJ.) delivered the following.

## JUDGMENT (FINAL).

It is said on the appellants' behalf that there was a prior judgment in their favour, of which they might have availed themselves if they had known that the view of the law now taken would be maintained. But this prior judgment was not pleaded, though it was open to the appellants to put it forward.

On the facts as found by the District Judge, we must hold that he was right in dismissing the suit, and therefore the appeal is dismissed, but without costs.

20 M. 145.

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APPELLATE CIVIL.

20 M. 145.

## [145] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.*

KUMARASAMI PILLAI (*Defendant*), *Appellant* v. ORR AND ANOTHER (*Plaintiffs*), *Respondents*.* [3rd November, 1896.]

*Karnams in a permanently settled estate—Regulation XXV of* 1802, *Sections* 8, 11—*Regulation XXIX of* 1802, *Section* 5—*Right to dismiss a karnam—Delegation of such right to lessees of Zamindari—Damages accrued by a karnam's neglect of a statutory duty.*

The lessees of a zamindari are not entitled to sue for the removal of a karnam from office, though their lease contains a provision purporting to authorise them to appoint and remove karnams, but if they suffer any loss from the karnam's neglect of his statutory duty, they are entitled to bring an action for damages against him.

APPEAL against the order of W. Dumergue, District Judge of Madura, in Appeal Suit No. 594 of 1895, setting aside the decree of C. Gopalan Nayar Subordinate Judge of Madura (East) in Original Suit No. 22 of 1895 and remanding that suit for disposal on the merits.

The plaintiffs held from the Zamindar of Sivaganga a lease of his estate which, *inter alia*, authorised them to " proceed in their own names to exercise all the powers which would be exercised by the zamindar, including the appointment and removal of village karnams and other servants for the management and improvement of the said zamindari." The plaintiffs alleged that they had suffered loss by reason of the omission of the defendant, who was the karnam of a village in the zamindari, to render due accounts and to perform certain other duties, and they sued to have him removed from office and for damages.

The District Munsif held that the suit was not maintainable for the reason that the plaintiffs were not the proprietors of the zamindari and had not been registered as transferees under Regulation XXV of 1802, Section 8. He referred to *Cherukomen* v. *Ismala* (1), *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty* (2) [146] *Valamarama* v. *Virappa* (3), *Ramachandra* v. *Appayya* (4), *Subramanya* v. *Somasundara* (5), and *Ayyappa* v. *Venkatakrishnamarazu* (6).

The District Judge held that the suit was maintainable and set aside the decree and remanded it to be disposed of on the merits. He distinguished the cases cited by the Subordinate Judge and supported his view by a reference to *Syed Ali Saib* v. *Zamindar of Salur* (7), and *Vizianagaram Maharaja* v. *Suryanarayana* (8).

The defendant preferred this appeal.

Mr. *R. F. Grant*, for appellant.

Mr. *Norton* and Mr. *Ryan*, for respondent.

### JUDGMENT.

If the plaintiffs have, in fact, suffered any damage from a neglect of a duty imposed by statute on the karnam, they are entitled to bring a suit to recover such damage.

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* Appeal against Order, No. 57 of 1896.

(1) 6 M.H.C.R. 145. (2) 1 M. 235. (3) 5 M. 145.
(4) 7 M. 128. (5) 15 M. 127. (6) 15 M. 484.
(7) 3 M.H.C.R. 5. (8) 9 M. 307.

1896 Nov. 3. — Appellate Civil. — 20 M. 145.

Section 11 of Regulation XXV of 1802 does not restrict or take away this right. As regards that portion of the plaintiffs' action, which relates to their claim to remove the karnam from his office, the first question is whether the plaintiffs in their right as lessees (independently of the clause in their lease purporting to transfer to them the right to bring such a suit) can maintain that portion of their claim. Section 11 clearly gives this power to the zamindar or proprietor and to no one else. Inasmuch, therefore, as the plaintiffs' assignment does not make them proprietors or zamindars within the meaning of the Regulation, they cannot sue.

Section 5 of Regulation XXIX of 1802 cannot be read as conferring a general right to bring such an action on any person interested, but must be read in conjunction with Section 11 of Regulation XXV already referred to.

The next point raised by plaintiffs' counsel was that the zamindar had, by a special provision in the plaintiffs' lease, assigned to the plaintiffs the right to bring a suit to remove karnams and therefore the plaintiffs were entitled to maintain this part of their claim.

Having regard to the nature of the power in question, we think it was not one which could be transferred. *Delegata potest as non potest delegari.*

[147] We therefore think that plaintiffs cannot maintain so much of their action as relates to the removal of the defendant from his office. The order of the District Judge remanding the suit for trial, so far as the plaintiffs' right to claim for damages is concerned, is right. It must, however, be modified as to the remainder of the claim and the suit to this extent be dismissed.

Each party must bear their own costs of this appeal.

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**20 M. 147.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.*

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SUBRAMANIA AYYAR (*Defendant*), *Appellant No.* 2 *v.* SITHA LAKSHMI (*Plaintiff's Representative*), *Respondent.**
[12th November, 1896.]

*Transfer of Property Act—Act IV of* 1882, *Section* 127—*Onerous gift to an infant—Acceptance.*

Land was given by the defendant to the wife of the plaintiff burdened with an obligation. She accepted the gift and died in infancy leaving the plaintiff her heir. The plaintiff now sued to make good his title to the land against the donor :

*Held*, that the gift was complete as against the donor and that the plaintiff was entitled to a decree.

SECOND appeal against the decree of T. Ramachandra Rau, Subordinate Judge of Trichinopoly, in Appeal Suit No. 154 of 1893, reversing the decree of G. Narasimhalu Naidu, District Munsif of Kulitalai, in Original Suit No. 363 of 1891.

The plaintiff sued as the heir of his wife who was the daughter of defendant No. 2, and died when an infant, to recover certain land which had been given to her by her father under a deed of gift which was in the following terms :—

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* Second Appeal, No. 981 of 1895.

1896 Nov. 12.

APPELLATE CIVIL.

20 M. 147.

"Deed of gift in respect of Manjakani (dowry), dated 1st February "1889, executed by Subramania Ayyar, son of Rangaier, Brahman, "saivite, cultivator, residing at Mutharasanallur, Trichinopoly Taluk, to "Venkatasubbammal, wife of Somarasampettah Gopalier, and my eldest "daughter, Brahman, saivite and housewife residing at the said Muthara-"sanallur, is as follows :—

"'**[148]** As I have, with perfect willingness, made a free gift to you "'on this date for Manjakani (dowry), nanjah, survey No. 591, letter "'A, Nanjanthirathu Kattalai, decimal 86,—said No. letter B, decimal "'32—No. 592, nanjahs classed as punjah, decimal 7 or total acre 1, "'decimal 25, together with all the samuthayams appertaining thereto, "'you will not only yourself enjoy the said lands as long as the sun and "'the moon last, but also, your issue will hold and enjoy them with "'absolute rights. Out of the debt I have now borrowed from Matharu-"'boothamier of Kottaimal Agraharam, on the security of the said land, "'the balance still due, after deducting Rs. 200 which I have, on this "'date, asked my brother-in-law Natasaier to pay, after executing in his "'favour documents with certain particulars, is Rs. 255, including "'the principal and interest. This sum of two hundred and fifty-five "'rupees, you will, yourself, pay out of the income of the aforesaid land, "'and you will yourself enjoy the said lands with absolute rights and "'live in happiness. The former enjoyment of the said lands was mine, "'and the present enjoyment is yours. There is no other prior encum-"'brance in respect of the said land. To this effect, I executed a deed "'of gift in respect of Manjakani (dowry) in favour of Venkatasubb-"'ammal with my consent. The said lands are worth Rs. 800.'"

The land had since been leased by the plaintiff to defendant No. 1 who did not defend the suit. Defendant No. 2 with whom he was stated to be acting in collusion pleaded that the gift was not binding on him for the reasons that it was not accepted by the donee, and was burdened with an obligation which she being an infant could not elect to undertake.

The District Munsif upheld the first plea and dismissed the suit.

The Subordinate Judge on appeal reversed his decree.

Defendant No. 2 preferred this second appeal.

*Kothandarama Ayyar*, for appellant.

*Seshagiri Ayyar*, for respondent.

## JUDGMENT.

The Subordinate Judge has found as a fact that the property given was delivered to and accepted by the deceased minor, wife of the plaintiff, who now sues for the property given. It is contended before us that inasmuch as the deed of gift imposed an obligation on the donee and the donee died a minor, there is no complete gift which binds the donor.

**[149]** We think the gift is complete. Section 127 of the Transfer of Property Act only gives the minor the right to repudiate on attaining majority, such repudiation became impossible in the present case.

The decision of the Subordinate Judge is right.

The second appeal fails and is dismissed with costs.

1896
Nov. 24.

APPELLATE CIVIL.

20 M. 149 = 7 M.L.J. 18.

20 M. 149 = 7 M.L.J. 18.

## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Davies.*

PEDDA SUBBARAYA CHETTI AND OTHERS (*Plaintiffs*), *Appellants* v. GANGA RAZULUNGARU AND OTHERS (*Defendants*), *Respondents*.*
[12th and 24th November, 1896.]

*Mortgage—Covenant to pay interest—Interest post diem.*

In a suit on a mortgage, it appeared that the instrument sued on was executed to secure a sum of money arrived at by calculating interest on sums previously due by the mortgagors, and it was expressed to be for securing the payment of that principal together with interest as it might accrue annually. There was also a provision for compound interest. The principal was payable on 14th July 1886, and there was no express stipulation to pay interest after that date;

*Held*, that the mortgagees were entitled to interest for the subsequent period.

[F., 23 M. 534 = 10 M.L.J. 101.]

APPEAL against the decree of E. J. Sewell, District Judge of North Arcot, in Original Suit No. 33 of 1893.

The plaintiff sued upon a mortgage document, dated 19th December 1882, to recover principal and interest amounting together to Rs. 10,878-10-0. This sum comprised interest computed for the period subsequent to 14th July 1886, and it was argued that interest should cease from that date.

The mortgage document omitting formal parts was as follows:—

"On looking into the account up to date in the presence of our "gumasta Kamaraju Narayaniah, the amount, including the principal and "the interest in respect of the bond executed on the [150] 14th November "1879 to you and to your brother Chengalroya Chetti, is Rs. 7,106-9-0, "excluding the amount of Rs. 3,553-4-6, contained in the bond executed "by us to-day to your brother Chengalroya Chetti, we are indebted "to you, Rs. 3,553-4-6, which is to be given to you Rs. 1,219-6-0 "being the amount, interest included, for the cloths and other "things given by you from the first of Tai in Pramadi year up to this "date and Rs. 25 the cost of the stamp; in all, Rs. 4,797-10-6. Therefore, "for the payment of the principal and the accrued interest at the rate of "$\frac{3}{4}$ rupee for Rs. 100 per mensem, we have hypothecated to you also the "village of Arungolam No. 193, including the hamlet of Vemulnayudi "Khandrika situated in Nemali Division, Chirutani Taluk, Chirutani Sub-"District, Carvetinagaram Samstanam, North Arcot District, which is the "minor's ancestral property, our inamti enjoyed by our forefathers and "afterwards by ourselves, and which is in our possession and enjoyment; "the tanks, channels and fountains related thereto; all the profits and rights "enjoyed by us: this village is hypothecated on 29th June this year to "Pedda Munusami Naidu (son of Bollini Appasami Naidu) and others "residing in Velanjeri village, Chirutani Taluk; it is hypothecated to "your brother Chengalroya Chetti this day. Hence the particulars "of arrangements made for the payment of the said debt. From this date "forward, we will continue to pay the interest due on the 30th of Panguni "of each year. If we fail to pay the interest according to the date fixed, "we will continue to give interest on that interest amount. We will pay

* Appeal No. 113 of 1895.

1896 Nov. 24. — APPELLATE CIVIL. — 20 M. 149 = 7 M.L.J. 18.

"the principal amount of rupees by the end of Ani of the Parthiva year; "and we will take back this bond paying off on the one occasion principal "and the interest that may then become due exclusive of the payments "made."

The District Judge referred to *Mansab Ali* v. *Gulab Chand* (1), and held that interest was not payable as such after the due date and it could not be awarded as damages by reason of the operation of Limitation Act, Schedule II, Articles 115 and 116, and he passed a decree in accordance with this ruling.

The plaintiff preferred this appeal.

Mr. *Subramaniam*, for appellants.

*Sadagopachariar and Seshagiri Ayyar*, for respondents.

[151] The judgment of the High Court on the question of interest was as follows:—

## JUDGMENT.

Two points are raised in this appeal. The first relates to the claim for interest accruing after the due date fixed for the payment of the principal in the mortgage instrument of the 19th December 1882. The District Judge considers that the instrument contains no stipulation, express or implied, to pay interest after the 14th July 1886, by which day the mortgagor undertakes to pay the principal. He refers to one of the numerous cases dealing with the question of interest payable under a mortgage. It is not necessary to discuss those cases, *firstly*, because the question is entirely one of construction to be answered with reference to the language of the particular instrument, and *secondly*, because we have a recent ruling of the Judicial Committee by which we must be guided in construing that instrument (*Mathura Das* v. *Raja Narindar Bahadur* (2).)

In this case, after stating how the sum of Rs. 4,797-10-6 has come to be due, the instrument goes on to say that "for the payment of the principal and interest which may accrue at the rate of ¾ rupee per cent. per mensem we have hypothecated, &c." Then the property is described and the instrument proceeds to state how the money shall be paid. The interest is to be paid on the 30th Panguni of each year, and in case of default compound interest. The principal is to be paid by the end of Ani of the Parthiva year.

Now, it is true that there is not in terms a stipulation to pay interest after the end of Ani in the year Parthiva, and hence it is argued that the parties did not intend such payment to be made. But we have to look at other parts of the instrument besides the covenant to pay the principal on a fixed date. The amount found to be due and secured as principal is arrived at by calculating interest on sums originally due by the mortgagors, and the hypothecation is expressed to be for the payment of that principal and interest as it may accrue. That seems to show that interest was to be paid in the future as well as in the past. Then there is the clause providing for compound interest which certainly points to a liability for interest accruing after the due date. These provisions are more consistent than otherwise with an intention which in itself is the most probable one, when, to use the language of [152] the Judicial Committee, regard is had to "the ordinary expectations of persons entering into a mortgage transaction." We should only be defeating those expectations if we held with the District Judge that the mortgage document

(1) 10 A. 85. (2) 19 A. 39.

1896 Nov. 24. — Appellate Civil. — 20 M. 149 = 7 M.L.J. 18.

carried no interest after the due date. We are, therefore, of opinion that according to the right construction of the instrument the mortgagor incurred the obligation to pay interest on the principal amount remaining unpaid on the 14th July 1886.

* [The other point taken is that which is raised by the sixth issue. The District Judge has held that the sale of the mortgaged property made at the instance of the plaintiff, must be subject to the 5th defendant's claim. That claim arises in this way. On the date of the plaintiff's mortgage, another mortgage of the same property was executed by the same mortgagor in favour of one Chengalraya. On this mortgage, Chengalraya sued and obtained the ordinary decree, the plaintiffs not being made parties to that suit. That decree was satisfied by means of money borrowed from the 5th defendant, who thereupon took a fresh mortgage dated the 21st August 1893. It is contended that, as the 5th defendant's money has gone to pay off Chengalraya's mortgage, he must be entitled to the benefit of that mortgage, and that, accordingly, his claim must have priority over the plaintiffs. It is more than doubtful whether Chengalraya's mortgage ought to be treated as prior to the plaint mortgage of even date executed in Virasami's favour ; but, apart from that, there is the circumstance that Chengalraya's mortgage has become merged in the decree obtained upon it. The 5th defendant cannot be in a better position than he would be if he had taken an assignment of Chengalraya's mortgage, and as assignee, he clearly could not rely on the mortgage after it had passed into a decree. He might have obtained a transfer to himself of the decree ; but this he has not done and a transfer is now impossible since satisfaction has been entered up. In *Seetharama v. Venkatakrishna*, 16 M. 94 the fact that there had been a decree on the mortgage seems to have been overlooked, and the point now raised was not considered. On the second point also we think the District Judge has erred.

The appeal must, therefore, be allowed and the decree of the Lower Court modified in the following respects :—

(1) The portions of it referring to the priority of the 5th defendant's mortgage must be expunged ;

(2) The date for calculating the interest due to plaintiffs on their mortgage must be extended from the 14th July 1886, up to the date of suit, *viz.*, 30th September 1893 ;

(3) The date for payment by defendants Nos. 2 and 3 and 1st defendant's representative must be altered into the date, six months after the date of this decree, and,

(4) The costs of the 5th defendant made payable by the plaintiffs must be disallowed, and the 5th defendant must be directed to pay the plaintiff's costs in both Courts to the extent to which he is liable on the case set up by him. The defendants Nos. 2 and 3 and 1st defendant's representative must further pay the plaintiff's costs throughout on the larger sum now decreed against them.]

* The portion in the rectangular brackets, forms a part of the judgment in this case though omitted in the I.L.R.—Ed.

20 M. 152=6 M.L.J. 232.

1896
AUG. 25.

APPELLATE CIVIL.

20 M. 152=6 M.L.J. 232.

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

SANKARAN (*Respondent*), *Appellant v.* RAMAN KUTTI AND OTHERS (*Appellants*), *Respondents.** [5th and 25th August, 1896.]

*Letters Patent, Section* 15—*Appeal under Letters Patent—Civil Procedure Code, Section* 588—*Powers of Appellate Court under Section* 588.

A Judge of the High Court when hearing an appeal under Civil Procedure Code, Section 588, against an erroneous order of remand, under Section 562 may, if he thinks fit, pass a final decree in the suit instead of merely remanding the suit to the Lower Appellate Court. No appeal lies against such decree under Letters Patent, Section 15.

[Diss., 26 C. 361; F., 20 M. 407; R., 15 Ind. Cas. 181 (182)=15 O.C. 33; 21 M.L.J. 1074 (1075)=10 M.L.T. 278=(1911) 2 M.W.N. 259.]

APPEAL under Letters Patent, Section 15, against the judgment of Mr. Justice Parker, in appeal against order No. 18 of 1894, setting aside the decree of E. K. Krishnan, Subordinate Judge of South Malabar, and restoring the decree of T. A. Ramakrishna Ayyar, District Munsif of Choughaut, in original suit No. 404 of 1892.

The facts of this case and the nature of the earlier proceedings appear sufficiently for the purposes of this report from the judgment of the High Court.

This appeal under the Letters Patent was preferred by the plaintiff.

*Sankarn Nayar*, for appellant.

*Sundara Ayyar*, for respondents.

## JUDGMENT.

[153] Plaintiff and defendants No. 1 and 2 are brothers. Third defendant is their father. All four form an undivided family of Tiyans following the Makkattayam rule of inheritance. A kanom was granted by a land-owner in the name of the first defendant. On redeeming the kanom, the landlord paid into Court the amount of the kanom, together with compensation for trees and a house on the land redeemed. The decree in the suit (original suit No. 29 of 1892) directed that all the money should be paid to first defendant, as the kanom was in his name, 'unless defendants Nos. 2, 3 and 5' (the present second and third defendants and plaintiff) 'sue to establish their right to it.'

The plaintiff alleged that the kanom and the trees, for which compensation was paid, were joint family property, but that the house was his own sole property, having been built solely with his own funds. He sued for a declaration of his right to recover his one-fourth share of the money deposited for the kanom, and as compensation for the trees, and for a declaration of his right to the whole of the money deposited as compensation for the house.

The third defendant supported the plaintiff's claim. The first defendant claimed the whole of the money as his own on the ground that the kanom was not joint family property, but his own acquisition. The second defendant alleged that all the property was joint family property. The

* Letters Patent Appeal No. 16 of 1895.

1896 AUG. 25. — APPELLATE CIVIL. — 20 M. 152 = 6 M.L.J. 232.

District Munsif found that the suit for a bare declaration was not sustainable with reference to Section 42 of the Specific Relief Act, and also that plaintiff without suing for partition could not sue for a declaration of his right to a share of the joint family property, nor for a declaration of his sole right to the compensation for the house since the latter had become merged in the family property. He therefore dismissed the suit. The Subordinate Judge reversed this decree and remanded the suit for trial on the merits, holding that the plaintiff could maintain the suit as framed. Against this order of remand the first defendant appealed to the High Court and the appeal was heard by Mr. Justice Parker sitting alone. He held that the passing of the decree in original suit No. 29 of 1892 gave the plaintiff no cause of action for a declaratory suit, though it was open to plaintiff to sue first defendant for the value of the house, if the latter belonged to the plaintiff, and also that plaintiff could sue for his share of the family property, but not for his share of [154] a particular part of it. He, therefore, set aside the order of the Subordinate Judge and restored that of the District Munsif.

Against this order the plaintiff now appeals under Section 15 of the Letters Patent.

A preliminary objection is raised that, as Mr. Justice Parker's order was passed under Section 588, Civil Procedure Code, such order is final under the last clause of that section, and is not open to appeal.

We have no doubt but that the objection is valid. Section 588, Civil Procedure Code, is by Section 632 of the same Code declared to be applicable to the High Court, and the right of appeal given by Section 15 of the Letters Patent against an order of a single Judge of the High Court is subject to the limitations prescribed by the Code of Civil Procedure, *Achaya* v. *Rutnavelu* (1).

It is however contended that Section 588 only empowered Mr. Justice Parker to determine whether the order of the Subordinate Judge in remanding the suit was right or wrong, but did not give him jurisdiction to go further and pass a decree in the suit, as he did when he restored the District Munsif's decree dismissing the suit, and in support of this contention it is pointed out that had Mr. Justice Parker merely decided that the Subordinate Judge's remand was wrong, and remanded the suit to him for disposal according to law, instead of himself restoring the District Munsif's decree, then the plaintiff would have been entitled to a second appeal to a Division Bench of two Judges of this Court in the event of the subordinate Judge dismissing his appeal: whereas by the procedure adopted by Mr. Justice Parker, the plaintiff is obliged to abide finally by the opinion of a single Judge of this Court on a point of law instead of being entitled to have the point decided by a Bench of at least two Judges. Such a result may be to some extent anomalous; but the existence of an anomaly does not justify us in overruling the provisions of the law. That the Court when hearing an appeal under Section 588, Civil Procedure Code, against an order of remand under Section 562, Civil Procedure Code, may deal with the correctness of the Lower Court's decisions on the preliminary point, and may, if it sees fit, pass a final decree in the suit, instead of merely remanding the suit to the Lower Appellate Court, has been decided by the High Courts of Calcutta and [155] Allahabad in *Loki Mahto* v. *Aghoree Ajail Lall* (2) and *Hasan Ali* v. *Siraj Husain* (3), respectively, and this appears to be also the view taken by the Full Bench of the Bombay High Court in

(1) 9 M. 253. (2) 5 C. 144. (3) 16 A. 252.

*Bhau Bala* v. *Bapaji Bapuji* (1), and by the Full Bench of the Allahabad High Court in *Badam* v. *Imrat* (2), Spankie, J., dissenting. It has also been so decided by a Bench of this Court in *Kothandaramasami Naidu* v. *Krishnasami Naicken* (3). We see no sufficient reason for dissenting from these authorities.

1896 AUG. 25. — APPELLATE CIVIL. — 20 M. 152 = 6 M.L.J. 232.

The result is that the order now appealed against must be regarded as having been legally passed under Section 588, Civil Procedure Code. Such an order is not open to appeal under the Letters Patent. We must, therefore, dismiss this appeal with costs.

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**20 M. 155.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

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TIRUPATI RAZU (*Defendant No.* 3), *Petitioner v.* VISSAM RAJU AND ANOTHER (*Defendants Nos.* 1 *and* 2), *Respondents.** [30th November and 1st December, 1896.]

*Civil Procedure Code—Act XIV of* 1882, *Section* 470—*Interpleader suit—Act IX of* 1889—*Provincial Small Cause Courts Act, Schedule II, Articles* 11 *and* 14—*Claim for compensation awarded under Land Acquisition Act.*

Land having been compulsorily acquired under Land Acquisition Act for the purpose of the East Coast Railway, the compensation was fixed at Rs. 468. A conflict having arisen as to the right to receive the compensation and the District Court having declined to determine it under Land Acquisition Act, Section 15, an inter-pleader suit was instituted on behalf of the Secretary of State in the Court of the District Munsif. The decision of the District Munsif having been confirmed on appeal, the unsuccessful claimant preferred a petition to the High Court under Section 622, Civil Procedure Code :

*Held*, that the inter-pleader suit was not within the jurisdiction of a Provincial Small Cause Court and was rightly brought on the ordinary side of the District Munsif's Court and consequently where the petitioner's remedy was by way of second appeal the petition for revision was not admissible.

**[156]** PETITION under Civil Procedure Code, Section 622, praying the High Court to revise the decree of H. R. Farmer, District Judge of Vizagapatam, in appeal suit No. 396 of 1894, affirming the decree of Y. Janakiramayya, District Munsif of Vizagapatam, in original suit No. 265 of 1893.

This was an inter-pleader suit instituted on behalf of the Secretary of State under the following circumstances :—

Certain mirasi land was compulsorily acquired for the East Coast Railway and a sum of Rs. 468-12-0 was fixed as the compensation for it. Defendants Nos. 1 and 2 were in possession of the land and claimed it as their property, although it was once admittedly the karnam's service inam. The third defendant was the working karnam and he claimed to be entitled to the land as such and consequently entitled to the money. The matter had been referred by the Collector to the District Court under Act X of 1870, Section 15, Clause 5 ; but the Court declined to interfere on the ground of want of jurisdiction and neither of the defendants had since made good his claim to receive the compensation money. The District

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* Civil Revision Petition No. 201 of 1896.

(1) 14 B. 14. (2) 3 A. 675.

(3) Letters Patent Appeal No. 35 of 1894 unreported.

1896 DEC. 1. — APPELLATE CIVIL. — 20 M. 155.

Munsif decided in favour of defendants Nos. 1 and 2 and his decision was confirmed by the District Judge.

Defendant No. 3 preferred this petition.

Mr. *Satya Nadar*, for petitioner.

*Pattabhirama Ayyar*, for respondents.

JUDGMENT.

The Collector having done all that he could do under the Land Acquisition Act was not, in our opinion, precluded from bringing this suit in an ordinary Civil Court, there being no prohibition by any enactment against his doing so. The next question is whether the suit should have been brought in a Small Cause Court, assuming that there was one having jurisdiction up to Rs. 500, which appears not to have been the case. Having regard to Article 14 of the Second Schedule of the Provincial Small Cause Courts Act, which excludes suits for the recovery of compensation paid under the Land Acquisition Act from the Small Cause jurisdiction, we think the present, which is a substantially similar suit, did not lie in the Small Cause Court, as it involved, not incidentally but necessarily, the determination of a title to land, and would consequently fall under Article 11. In this view, a second appeal lay, and a petition for revision is not admissible. It is accordingly dismissed with costs.

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20 M. 157.

## [157] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.*

PUTHIANDI MAMMED (*Plaintiff*), *Petitioner v.* AVALIL MOIDIN (*Defendant*), *Counter-Petitioner.** [13th November, 1896.]

*Transfer of decree—Subsequent attachment in execution against transferor.*

A transferred a decree to B who recovered part of the amount due under it and was prevented from recovering the rest by an attachment of the decree in execution proceedings against A:

*Held*, that A was liable to pay compensation to B.

[Cons., 33 M. 62 (63) = 3 Ind. Cas. 938 = 6 M.L.T. 273; D., 5 M.L.T. 260.]

PETITION under Small Cause Courts Act, Section 25, praying the High Court to revise the proceedings of S. Subbayyar, Subordinate Judge of North Malabar, in small cause suit No. 417 of 1895.

Suit to recover Rs. 100 and interest. The decree in small cause suit No. 1,300 of 1890, which was passed in favour of present defendant, was assigned by him to the plaintiff. The plaintiff recovered a portion of the decree amount, but failed to recover the rest because the decree, of which the assignment had not been completed by the recognition of the Court, was attached in execution of a decree against the defendant. The plaintiff sued to recover the amount which he had failed to realise.

The Subordinate Judge was of opinion that the plaintiff's failure to recover the rest of the money payable under the decree was the result of his own laches in failing to adopt the procedure described by Civil Procedure Code, Section 232, and that the defendant accordingly was not liable

* Civil Revision Petition No. 851 of 1895.

1896 Nov. 13. — APPELLATE CIVIL. — 20 M. 157.

to pay damages. He distinguished *Krishnan* v. *Sankara Varma* (1) and dismissed the suit.

The plaintiff preferred this petition.

Mr. *Krishnan*, for petitioner.

*Ryru Nambiar*, for counter-petitioner.

## JUDGMENT.

All that the plaintiff got in law for the money he paid to the defendant for the transfer of his decree was an agreement to transfer it, not a complete transfer until recognised by the Court. The completion of the transfer in this case was **[158]** prevented by the attachment of the decree for the defendant's debts, and it was the defendant's duty to do all that was necessary to complete the transfer by removing the obstacle, the attachment. This he did not do and made it impossible for the transfer to the plaintiff to be completed by the recognition of the Court.

In these circumstances the plaintiff was entitled to succeed in his action. We must set aside the decree of the Subordinate Judge and decree the claim with costs and interest at 6 per cent., thereon from the date of plaint till date of payment.

The petitioner is entitled to his costs in this Court.

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**20 M. 158.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

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MUTHU AYYAR (*Purchaser*), *Petitioner v.* RAMASAMI SASTRIAL AND ANOTHER, *Counter-Petitioners.**
[1st December, 1896.]

*Civil Procedure Code—Act XIV of* 1882, *Section* 310-A (*a*)—*Application to set aside sale Deposit by judgment-debtor of the amount of debt—Poundage money.*

A judgment-debtor, whose land had been sold in execution, is entitled to have the sale set aside under Civil Procedure Code Section 310-A (*a*), if he deposits 5 per cent. of the purchase money including that deducted by the Court for poundage and fulfils the requirements of clause (*b*) even though something more on account of the poundage was recoverable from him under the head of costs.

[R., 23 B. 450; 4 Bur. L. T. 28=9 Ind. Cas. 472 (474).]

PETITION under Civil Procedure Code, Section 622, praying the High Court to revise the proceedings of N. Sambasiva Ayyar, District Munsif of Tiruvadi, on miscellaneous petition No. 840 of 1895.

The petitioner, who was the judgment-debtor in original suit No. 164 of 1893, preferred the above application under Section 310-A (*a*) of the Civil Procedure Code applying that the sale of certain immoveable property which had taken place in execution of that decree be set aside, on his depositing the amount specified in the proclamation of sale together with 5 per cent. on the purchase money. The purchaser objected saying, as was stated in the **[159]** judgment, that he lost $1\frac{1}{4}$ per cent. as poundage of $6\frac{3}{4}$ per cent. was deducted from the purchase money he had deposited.

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* Civil Revision Petition No. 190 of 1896.

(1) 9 M. 441.

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The District Munsif held that the requirements of the section had been satisfied and accordingly he set aside the sale.

The purchaser preferred this petition.

*S. Subramania Ayyar*, for petitioner.

Counter-petitioners were not represented.

## JUDGMENT.

Admittedly the judgment-debtor paid the 5 per cent. required under clause (*a*) of Section 310-A of the Code of Civil Procedure, upon the whole amount of the purchase money including that deducted by the Court for poundage. Under that clause he is not required to do any more. Having also fulfilled the requirement of Clause (*b*) he was entitled to have the sale set aside, even though something more on account of the poundage was recoverable from him under the head of costs provided for in the last clause of the Section 310-A. The petitioner was therefore wrong in opposing the setting aside of the sale. His course was to have applied to the Court for the recovery of what he was entitled to under Sections 315 and 310-A.

The petition is accordingly dismissed.

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**20 M. 159.**

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

VENKATASUBBARAYA CHETTI AND ANOTHER (*Counter-petitioners*), *Appellants v.* ZAMINDAR OF KARVETINAGAR (*Petitioner*), *Respondent.** [18th September, 1896.]

*Civil Procedure Code—Act XIV of* 1882, *Sections* 291, 311—*Material irregularity—Substantial loss.*

Where a material irregularity is proved to have occurred in the conduct of a Court sale, and it is shown that the price realised is much below the true value, it may ordinarily be inferred that the low [160] price was a consequence of the irregularity even though the manner in which the irregularity produced the low price be not definitely made out.

When a sale is adjourned under Section 291, the provisions of that section must be followed with exactitude.

[Appr., 6 C.W.N. 48 ; R., 31 C. 815=8 C.W.N. 686 ; 22 M. 440=9 M.L.J. 190; 34 C. 709=9 Bom. L.R. 651 (P.C.)=6 C.L.J. 11=11 C.W.N. 739=34 I.A. 164=17 M.L.J. 353; 14 C.L.J. 541 (551)=13 Ind. Cas. 337; 6 O.C. 61; U.B.R. (1907), C.P.C., p. 9.]

APPEAL against the order of E. J. Sewell, District Judge of North Arcot, passed on execution petition No. 48 of 1889, which was an application in original suit No. 3 of 1884.

Certain land having been brought to sale in execution of the above-mentioned decree, the judgment-debtor preferred the above petition under Civil Procedure Code, Section 311, praying that the sale be set aside on the ground of material irregularity in conducting it, which, as it was averred, had caused substantial loss to him.

The District Judge found that the land had been sold for much below its value and he said,—

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* Appeal against Order No. 3 of 1896.

1896 SEP. 18. APPELLATE CIVIL. 20 M. 159.

"If, therefore, any material irregularity in publishing the sale can be "proved, the substantial injury to the zamindar cannot be disputed.

"It is admitted that petitioner got the proclamation of sale issued in "August 1891 for sale in September 1891; but, by agreement with "petitioner, got the sale postponed five times to take place without any "fresh proclamation until it was eventually held on 29th October 1891.

"The Ameen, who conducted the sale, deposes that all sales are "published by beat of drum; but that, on October 29th, this was not "done as he could not find the monigar to get the publication so "ordered.

"The result was that there was practically no notice at all of the "sale. The amount of notice given by the proclamation had been waived "(petitioner, no doubt, being a consenting party to this). But, in the "absence of such proclamation and the usual notice by tom-tom, there "was really no publicity whatever given to the sale.

"I think this was a material irregularity. In the second place, the "counter-petitioner concealed the existence of any prior incumbrance. "The counter-petitioner examined, admits that he had notice of Kristnama "Charlu's mortgage from the Sub-Registrar's certificate which mentioned "it. His only explanation is that, as the date of the mortgage was 1873, "he concluded that, in 1888, it was barred by limitation, and so he stated "in [161] his execution application that the property was to be sold free "of incumbrances.

"But he admits that he had made no inquiries of Kristnama Charlu "as to whether there had been any payments or written acknowledgment "to keep alive the mortgage. As a matter of fact, the mortgagee had "actually sued out a decree. The mortgage, as the certificate showed, "was for a very large sum, so that the counter-petitioner could not really "have supposed that it had been allowed to lapse. I do not believe his "statement that he said the property was free of incumbrances because he "believed Kristnama Charlu's mortgage was barred. I believe his object "was to keep Kristnama Charlu in ignorance of his attachment and sale.

"The fact, that the sale was held free of incumbrances upon a false "statement to that effect in the application, is, I think, a material "irregularity."

In the result the District Judge refused to confirm the sale and directed a fresh sale to be held after due notice.

The decree-holders preferred this appeal.

*Ramachandra Rau Saheb and Kuppusami Ayyar*, for appellants.

Mr. *Subramaniam*, for respondent.

## JUDGMENT.

Though such irregularities as have occurred are mainly due to the zemindar's repeated applications for adjournment, yet, on considering all the facts of the case, we are not prepared to hold that the District Judge was wrong in regarding the irregularities, especially the omission to have the sale tom-tomed, as material and we think that where a material irregularity is proved and it is also proved that the price realized is much below the true value, then it may ordinarily be inferred that the low price was a consequence of the irregularity, even though the manner in which the irregularity produced the low price be not definitely made out. We therefore dismiss this appeal but without costs.

1896 SEP. 18. — APPELLATE CIVIL. — 20 M. 159.

We observe that the orders of the District Judge adjourning the sale did not comply with the provisions of Section 291, Civil Procedure Code, which require that adjournments shall be to a specified day and hour. It is of the utmost importance that in these matters the exact provisions of the Code should be followed.

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20 M. 162 (P.C.) = 1 C.W.N. 497 = 24 I.A. 73 = 7 Sar. P.C.J. 205.

## [162] PRIVY COUNCIL.

PRESENT:

*Lords Watson, Hobhouse and Davey, and Sir R. Couch.*

[*On appeal from the High Court at Madras.*]

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SRIMANT RAJAH YARLAGADDA MALLIKARJUNA PRASADA NAYUDU BAHADUR GARU, *Appellant v.* MAKERLA SRIDEVAMMA AND OTHERS, *Respondents.* [18th March, 1897.]

*Collection of debt on succession—Certificate of heirship—Acts XXVII of* 1860 *and VII of* 1889*—Right of succeeding trustee to collect.*

In a suit brought by a widow who had succeeded her husband as trustee of an endowment for a debt due thereto :

*Held*, that she was not suing as being entitled to the effects of her deceased husband, or for payment of a debt due to the estate which had been his, but that she was suing as representing the endowment in the capacity of a trustee of its money. Accordingly, neither Act XXVII of 1860 (collection of debts on succession), Section 2, nor Act VII of 1889 (the Succession Certificate Act), Section 4, was applicable to her claim, and her not having obtained a certificate of heirship to her husband's estate did not disentitle her to a decree.

[R., 28 B. 215 = 5 Bom.L.R. 932.]

APPEAL from a decree (27th April 1891) of the High Court, affirming a decree (20th December 1889) of the District Judge of Kistna.

The suit out of which this appeal arose was brought on the 27th March 1889 by Makerla Sridevamma, first respondent on this appeal, styling herself Manager and Dharmakarta of the Annapurna Choultry. She was the widow of Makerla Ragunatha Nayudu, son of Venkataswami Nayudu. Both the father, who founded, endowed and managed the choultry, and the son, who succeeded him in the management, died in 1879. On the death of her husband Sridevamma became manager.

The first defendant, who was now appellant, was the zemindar who, as holding an impartible estate, defended the partition suit relating to Devarakota in *Mallikarjuna* v. *Durga* (1).

On the 30th January 1876 he gave the following: Promissory note, dated the 30th January 1876, executed by Srimant Rajah Yarlagadda Mallikarjuna Prasada Nayudu Bahadur, Zemindar Garu, in favour of Makerla Raghunatha Rao Nayudu Garu :—

**[163]** "As I have this day borrowed from you Rs. 12,000 in cash, "out of the funds settled by you and your father for the upkeep of the "Annapurna Choultry caused to be built by your father in Bandar for the "purpose of paying off the *peishkush* and other Government dues payable "in respect of my estate, I promise to pay you every month only the in-"terest thereon at half a rupee per cent. per mensem, but retain the prin-"cipal amount with me alone for twelve years from this date, and pay

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(1) 13 M. 406.

"you the same as soon as the said twelve years expire, and get back this "promissory note.

"Promissory note executed and given to this effect with my consent."

1897 March 18.

Privy Council.

20 M. 162 (P.C.)=1 C.W.N. 497=24 I.A. 73=7 Sar. P.C.J. 205.

On the 15th January 1877, Venkataswami Nayudu made a will appointing his son Ragunatha heir to his estate, describing it as having been acquired by himself. In this will he stated that Rs. 12,000 had been invested with the Rajah as an endowment for the choultry. On the 2nd March 1879, he confirmed this and then died. Ragunatha took the estate, and on the 24th September in that year died, leaving, by his will, the immediate possession of it to Sridevamma, his second wife, whom he directed to adopt a son to him. This was done.

On the 11th December 1884, Makerla Venkataswami Nayudu, a minor, sued Sridevamma for a declaration that he had been adopted by her to her husband on the 6th September 1880, and demanded possession of certain property, one of the items of which was described as "Funds "remaining in the hands of the Chellapalli Zemindar, on account of "Annapurna Choultry, Rs. 12,000." As to the adoption and for possession he obtained a decree on the 15th March 1887; but the above item was excepted. Sridevamma in the present suit claimed the money due on the promissory note of the 30th January 1876 against the appellant and the Collector of the district, who had been appointed receiver of the Rajah's estate. She alleged that since her husband's death she had been managing the choultry and that payments of interest had been made upon the note by the first defendant to her husband and to herself. No reference was made in the plaint to the adoption.

The first defendant admitted that he had made the note, but said that the amount was a charge on the estate in the hands of the receiver; also, that the right to receive payment was in the adopted son, the widow having no certificate of heirship. The other defendants, the younger brothers of the first, they having [164] been joined at their own request, denied their liability. The receiver was willing to abide by the decision of the Court, and took no further part in the proceedings.

At the hearing in the Court of First Instance were cited *Re Bhyrub Bharuttee Mohunt* (1) and *Dukharam Bharti* v. *Luchmun Bharti* (2). The decision was that the plaintiff, being in possession of the office of trustee of the choultry, might, in that character, collect and give a valid receipt for a debt due to that institution. The claim was accordingly decreed. The first defendant appealed to the High Court on the ground that no certificate had been granted to the plaintiff to collect the debt due to her deceased husband, whom the Rajah had promised to pay. Also that the adopted son was the heir and representative.

On the 5th December 1890 the High Court (Collins, C.J., and Shephard, J.) made the following order:—

"The plaintiff does not, as far as we at present see, appear to be the "proper heir of the payee of the note, and the adopted son, who is "apparently the proper person to give a discharge, is not on the record. "We must adjourn the case for two months in order that the adopted son "may be made a party, and a guardian appointed: when that is done we "shall be in a position to dispose of the appeal."

The adopted son having been made a respondent on the appeal, the High Court gave the following judgment:—

(1) 21 W.R. 340. (2) 4 C. 954.

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"It now appears that the minor adopted son has been joined as a "party. As far as the plaintiff is concerned the appeal is therefore "dismissed with costs."

"As against the third and fourth defendants it is contended that the "first defendant (appellant) ought not to be made to pay their costs as "directed by the District Judge. On examining the record we find that "the third and fourth defendants became parties on their own motion and "that being so, we think they ought to pay their own costs."

"The decree of the District Judge must be modified accordingly. "And the third and fourth defendants must pay the costs of this appeal "so far as it has reference to them."

From this decree the Rajah now appealed.

Mr. *J. D. Mayne*, for the appellant.

**[165]** It was clear that no right to claim the money secured by the document of 1876 passed to Ragunatha personally by his father's will or to Sridevamma by her husband's will. The beneficial title to the money remained vested in the Annapurna Choultry. The right to sue for it might have vested in an executor of the will of Venkatasami, the original manager and trustee; but no such executor had been appointed. Then, again, the right to sue would have vested in such person as might have been appointed trustee under the Religious Endowment Act, 1863. There was, however, no evidence on the record showing that the plaintiff was appointed by proper authority to be the trustee or manager of this choultry. Suing as the representative of her late husband's estate, the widow could not obtain a decree for the sum which she claimed without having obtained a certificate under Act XXVII of 1860. The Act VII of 1889 made it the duty of the Court to see that a certificate had been obtained by the plaintiff. The latter Act came into operation on the 1st May 1889, the plaint having been filed on the 27th March in the same year. Thus the plaintiff had not fulfilled a condition precedent to her acquiring a right to sue, the getting a certificate of heirship. Her position had not been improved by the adopted son being made a party to the appeal; for, if he had had a title to sue for this debt, his title would have displaced the plaintiff's. The decree, however, obtained by him on the 15th March 1887, had expressly excepted the right to sue for this debt from the declaration of his title to the rest of his adoptive father's estate. The plaintiff could only claim through her husband, in right of her being his heir and representative, and for this purpose a certificate was necessary.

## JUDGMENT.

The respondents did not appear. Their Lordships' judgment was delivered by

LORD HOBHOUSE :—In this case the first defendant, who is the principal defendant, and appellant borrowed a sum of Rs. 12,000 out of the funds of a charitable endowment called a choultry, and he gave a promissory note to the founder of the endowment, who was then its manager.

The founder died, and he left the bulk of his estate to his son and heir, but taking notice that the son and heir should have nothing to do with the Rs. 12, 000, which were the endowment of the choultry. No doubt his son succeeded him in the management. He died within six months of his father, and his heir was **[166]** his widow. Then the widow succeeded in the management, and received interest on the Rs. 12,000. She, under a power given her by her husband, adopted a son

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in the year 1884, but that son was an infant, and the widow remained until after the institution of this suit in the management of the choultry.

The infant brought a suit against his adoptive mother and against his guardian for an account of his adoptive father's estate and for possession, and he got a decree, but in making that decree the Court expressly excepted the funds of the choultry. It seems that up to the commencement of this suit in the year 1889 the widow had received interest on the promissory note from the defendant, and either she or her husband received Rs. 1,000 in payment of principal. In 1889 the widow sued to recover the sum due upon the note, and she was met by two pleas: one was that she could not sue because she had adopted a son, and that son is the heir of his father and entitled to his father's estate. The answer to that plea is that she did not sue in respect of her husband's estate, but as trustee and manager of the choultry.

The second plea was that she had not got such a certificate as is required by law. The Act that is relied upon as necessitating the production of a certificate runs in these terms: "No debtor of any deceased "person shall be compelled in any Court to pay his debt to any person "claiming to be entitled to the effects of any deceased person except on the production of a certificate (1)." That is the Act XXVII of the year 1860. There is a subsequent Act, which Mr. Mayne says applies to the case, Act VII of 1889, but that uses exactly the same expressions so far as regards the person suing: "No Court shall pass a decree against a "debtor of a deceased person for payment of his debt without a certificate (2)."

Now the question is whether the widow here is suing as entitled to the effects of her deceased husband, or is suing for the payment of the debt of her deceased husband. She is doing neither one nor the other, she represents the endowment, and on that ground the District Judge declared that she was the trustee of this endowment, and that she was entitled to receive the debts, and he gave her a decree. The defendant appealed to the High Court, and the High Court took the precaution of suspending proceedings [167] until the adopted son, who, if anybody could dispute the widow's title to receive the debt, would be the person to dispute it, was made a party to the suit. Then in his presence they dismissed the appeal and affirmed the decree of the District Judge with some variation as to costs, as to which there is no question now.

It seems to their Lordships that that is perfectly right. The High Court has taken every precaution to protect the defendant in his payment of the money, and it is absolutely impossible that after that decree anybody can demand the money of him again.

Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed. The respondent does not appear, and there will be no order as to costs.

Appeal dismissed.

Mr. *R. T. Tasker*, solicitor for the appellant.

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(1) Act XXVII of 1860, Sec. 2. (2) The Succession Certificate Act, 1889, Sec. 4.

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APPELLATE CIVIL.

20 M. 167 = 6 M.L.J. 218.

20 M. 167=6 M.L.J. 218.

## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Davies.*

THE COURT OF WARDS AND ANOTHER (*Defendants* NOS. 1 AND 2), *Appellants*, *v.* VENKATA SURYA MAHIPATI RAMAKRISHNA RAO (*Plaintiff*), *Respondent.** [26th, 27th, 28th and 29th October and 23rd November, 1896.]

*Hindu Law—Impartible estate—Power of testamentary disposition—Will, construction of—Misdescription of legatee.*

The holder of an impartible estate may alienate it by will to the same extent that he may alienate it by gift *inter vivos*.

A testator made a bequest to "A B, my avurasa son," knowing that A B was not his avurasa son:

*Held*, that the misdescription was immaterial and that A B took the bequest.

[Affirmed., 22 M. 383 (P.C.) = 1 Bom. L.R. 277 = 3 C.W.N. 415 = 26 I.A. 83 = 7 Sar. P.C.J. 481; R., 20 M. 207 = 7 M.L.J. 143; 22 M. 9; 27 M. 228.]

APPEAL against the decree of G. T. Mackenzie, Acting District Judge of Godavari, in original suit No. 6 of 1891.

The suit was brought by the adopted son of the late Rajah of Pittapur to recover the Zemindari of Pittapur and other property belonging to the late Rajah from the second defendant who [168] claimed to be the natural born legitimate son of the late Rajah and from the Court of Wards (the first defendant), who, on the death of the late Rajah, had taken possession of the property in question on behalf of the second defendant.

The facts of the case were as follows:—

The Zemindari of Pittapur was granted to the ancestors of the late Rajah in 1647 in the days of the Muhammadan kings of Golconda. The late Rajah was born in 1844, and in 1854 succeeded his brother in the estate. He married his first wife in 1861, but had no issue by her till October 1885, when, as the defendants Nos. 1 and 2 alleged, she gave birth to the second defendant. On various dates the late Rajah married five other wives, but none of them bore any children until after the birth of the second defendant, when one of them was said to have given birth to a daughter.

On the 28th of September 1873, the late Rajah adopted the plaintiff. On the 1st of October following the late Rajah executed in favour of the plaintiff's natural father a document (Exhibit D.C.) in the following terms:—

"Whereas we had no issue of any kind and whereas we, on the 28th "ultimo, corresponding to Sunday, the 7th of this Sudha, adopted, in "accordance with the Hindu law, your second son named Sri Rajah "Ramakrishna Dasa Uachendrulu Varu, who is a gnati of our family and "who was born on Saturday the 7th of Kartika Bahula of the year "Kalayukti (27th Saturday 1858), and whereas we have given the son so "adopted the name of Sri Rajah Venkata Surya Mahipati Ramakrishna "Rao Bahadur and constituted him heir to our Zemindari of Pittapur, "&c., to all other properties moveable and immoveable, we agree in com"pliance with your request, to your retaining with my adopted son the "thirty servants you have been retaining and changing from time to time "and not to permit you or any one of your family to see him whenever

* Appeal No. 33 of 1895.

"you or they may come to see him, and we have accordingly executed "this agreement."

In or about 1881, differences and disputes arose between the plaintiff and the late Rajah, and the plaintiff in consequence left Pittapur and continued to live apart from the late Rajah till the latter's death. The late Rajah died on the 22nd July 1890. Before his death he executed three testamentary documents (Exhibits CXCIX, CCI, CCII) which were executed, respectively, [169] on the 16th February 1889, on the 7th September 1889, and on the 17th of March 1890.

Exhibit CXCIX, so far as material to this report, was in the following terms:—

"I write this will this 16th day of February 1889, as I am now "suffering from dropsy which seems to be difficult to cure.

"Though it is not necessary for a Hindu to execute a will to bequeath "his property to his legitimate (avurasa) son as Hindu law provides his "rights; yet to prevent further confusion I write this will to make the "public understand that I have determined to bequeath my property to "my avurasa son according to Hindu law. My avurasa son Kumara "Mahipati Venkata Surya Rao should succeed to my property. My "apopted son Venkata Mahipati Surya Ramakrishna Rao, the second son "of the Rajah of Venkatagiri, has already been provided by me a money "allowance of Rs. 24,000 one year according to their request and have "also given him vast moveable property and spent much money for his "marriage and other ceremonies by which I fell in debt to the Rajah of "Venkatagiri. This debt is to be liquidated according to the instalments "stated in the bond by the income of the estate and not from the "property given to the adopted son nor from his usual money allowance. "My adopted son should, as usual, receive his monthly allowance of "Rs. 2,000, including annual payment of Rs. 6,000, but my avurasa son "will, by any reason or other, be unwilling to give this allowance in cash "he may allot any portion of my self-acquired proprietary estates to him "which fetches an equal income of Rs. 24,000 a year, but should not in "any circumstance go to disputes with each other, the one to get more "and the other to lessen it."

Exhibit CCI was as follows:—

"I have hitherto executed a will on 16th February 1889, placed it "in a sealed cover (portion torn), and deposited the same in the office "of the Registrar. As it has been by intention to give all my moveable "and immoveable property to my avurasa son Kumara Mahipati Venkata "Surya Rao, as mentioned above, the said will was written in that "manner. As it struck me that by the wording of that will it might be "construed that I got the will written in such terms because I thought "that my whole property would be obtained by my avurasa son according "to the Hindu law alone, and in order to make my intentions clear "[170] leaving no room for entertaining doubts, I have executed this "will to form part of my former will.

"It is my intention that my avurasa son alone should obtain not "only the impartible ancient Pittapur Zemindari estate, but also the "following properties which form my self-acquisition. . . . The "villages in the Thotapalli estate, the Veeravaram estate in Dandangi "Mutah and the Ananthavaram village and other immoveable properties "as well as the Palivela estate, which I got in pursuance of the will of "my paternal aunt Raja Vellanki Lakshmi Venkaiyamma Row Garu.

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"These properties should, therefore, rest in him accordingly. The whole "of my immoveable property including my jewellery, &c., should be "obtained by my avurasa son alone."

Exhibit CCII, so far as it is material for the purposes of this report, was in the following terms :—

"It is just under the Hindu law that the avurasa son should succeed "to all the properties. It is my intention also that he should so succeed. "Some immoveable properties, such as proprietary estates, and most part "of the moveable properties form my self-acquisition. Although they are "not of the impartible nature as the ancient Zemindari of Pittapur, "those properties, as well as my other moveable and immoveable properties "of all kinds, should be obtained by my avurasa son Chiranjeevi "Raja Kumara Venkata Mahipati Surya Rao.

"It is also my intention that Chiranjeevi Raja Venkata Surya Mahi-"pati Ramakrishna Rao, the second son of the Venkatagiri Raja, whom "I had hitherto adopted should be receiving cash payment which he "had been receiving hitherto according to the settlement made before "at their request. As the settlement formerly made is also to the effect "that he should continue to receive such payment in future also, that "should take place accordingly. A good deal of moveable property was "already given to the said adopted son, and his marriage, &c., were per-"formed at a great cost and trouble; owing to this, I had to contract "a loan from Venkatagiri people. The balance of the debt due to them "should be discharged by instalments from the taluk (estate), but nei-"ther the property given to the adopted son, nor the money allowance "he should be getting, should be made answerable for the said debt. In "case my avurasa son is unwilling to continue payment of the money "allowance to the **[171]** adopted son, my avurasa son may give to the "adopted son, in lieu of the money allowance, so much of the estate out "of the proprietary estates which form my self-acquisition as will fetch "a net income equivalent to the money allowance which the adopted son "has been receiving. But they both should not enter into any disputes "saying that the allowance already fixed for the adopted son is excessive "or low."

On the death of the late Rajah the Collector as Agent of the Court of Wards took possession on behalf of the second defendant of the estate belonging to the late Rajah. The plaintiff then brought this suit, claiming to be entitled to all the property left by the latter. He denied that the second defendant was the son of the late Rajah. He further contended that, even if the second defendant were the son of the late Rajah, he was entitled by right of primogeniture to succeed exclusively to such of the property of the late Rajah as might be found to be impartible, and was entitled as eldest surviving member of the late Rajah's family to the possession of such of the property as might be found to be partible.

The second defendant asserted that he was the son of the late Rajah and that he, as the natural born son of the late Rajah, was entitled to such of the property as might be found to be impartible to the exclusion of the plaintiff, who was only an adopted son, and that in such property as might be found to be partible the plaintiff as adopted could have no more than one-fourth the share of a natural born son.

The second defendant also laid claim to the properties of the late Rajah under the testamentary documents of the 16th February 1889, the 7th September 1889, and the 17th March 1890. He contended that the late Rajah had power to dispose of all the properties dealt with by the

testamentary documents inasmuch as these properties were partly self-acquired and partly ancestral impartible property. 1896 Nov. 23.

The plaintiff denied the validity of the testamentary documents executed by the late Rajah on the following grounds:— APPELLATE CIVIL.

(1) That the provisions of these documents were based on the assumption that the second defendant was the natural born son of the late Rajah, whereas as a fact he was not. 20 M. 167= 6 M.L.J. 218.

(2) That the provisions of these documents contravened the agreement of 1st October 1873. (Exhibit DC.)

[172] (3) That the will was wholly void under the Mitakshara law and by family custom.

(4) That inasmuch as no portion of the property was the self-acquisition of the late Rajah, the properties were inalienable by will.

The issues specifically referred to in the judgment are as follows:—

(iv) If the second defendant be found to be not in fact the son of the late Rajah, whether he is precluded from claiming under the said testamentary disposition.

(v) Whether the said testamentary disposition contravenes the provisions of the instrument of 1st October 1873 executed by the testator, and if so, whether such disposition is invalid by reason thereof.

(vi) Whether the properties specified in Schedules 1 and 2 of the second defendant's written statement are impartible.

(viii) Whether the aforesaid testamentary disposition in so far as it relates to properties, if any, found to be impartible is invalid under either Hindu law or family custom or by reason of the tenure on which the suit estate is held.

The District Judge found that the second defendant was not the son of the late Rajah and that certain of the properties of the late Rajah were ancestral impartible property and the rest were the self-acquisition of the late Rajah. With regard to the alienability of the properties, he said: "it appears to me that the decision of the Privy Council in *Sartaj Kuari* "v. *Deoraj Kuari* (1), which runs counter to the whole previous current of "Madras decisions, must not be stretched too far. That decision is that "the holder of an impartible zemindari may alienate a portion of the "estate, unless there is some custom or something in the tenure by which "the estate is held, which forbids such alienation. It is a very long stride "from a decision which allowed the alienation of a parcel of land or per-"mitted a mining lease to a decision which permits a zemindar to be-"queath his estate to any beggar he picks up out of the streets. I cannot "think that the Privy Council in the decision in *Sartaj Kuari* v. *Deoraj* "*Kuari* (1) contemplated [173] any such results of their decision. I am "of opinion that as the zemindari was in its origin a military or feudal "estate and that as the grant of a sannad in 1802 did not change the "previous tenure, there is certainly something in the tenure of this estate "that prevents the holder from bequeathing it *en bloc* to a stranger." And with regard to the validity of the testamentary disposition under which the second defendant claimed, he said: "The fourth and fifth issues raise "the question whether second defendant, although found in fact to be not "the son of the late Rajah, can inherit under these wills. Upon this "question Mr. Bashyam Aiyangar pointed out that second defendant, the

(1) 10 A. 272.

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"legatee, is an innocent person. He is no party to the fraud. Also plaintiff's case is that the late Rajah was a party to the fraud. Therefore the testator was not deceived and knew what he was doing when he made this bequest.

"Upon this point, I think, that there is much force in the contention of Mr. Bashyam Aiyangar that second defendant is an innocent person, that the testator knew what he was doing and that the second defendant ought to get at least the self-acquired property of the late Rajah. For some time I was disposed so to decide the matter. It may be that the Rajah intended second defendant, even if dispossessed of the zemindari, to get something as a recompense for the cruel position in which he has been placed. But upon further consideration I am of opinion that the adoption of plaintiff on 28th September 1873, and the subsequent agreement of October 1st, 1873, preclude the Rajah from bequeathing his property to a stranger. It is true the agreement of October 1st, 1873, is not a settlement of property, but it is evidence to show that the Rajah of Venkatagiri gave plaintiff in adoption to the Rajah of Pittapur with an implicit understanding between them that plaintiff should inherit in the event of there being no begotten son. That event has now happened, and I think that this implicit agreement upon which the adoption took place is sufficient to hinder the Rajah of Pittapur from bequeathing even his self-acquired property away from plaintiff."

In the result he gave a decree in favour of the plaintiff directing the first and second defendants to deliver up to him the properties moveable and immoveable left by the late Rajah.

The first and second defendants appealed.

**[174]** *Bashyam Aiyangar*, with him *Ramasubba Ayyar*, *Subba Row* and *Subramania Ayyar*, for appellants.

The appellant not only claims as the son of the late Rajah, but he claims also under the will of the latter: *viz.*, under the three documents executed by the late Rajah on the 16th February 1889, on the 7th September 1889 and on the 17th March 1890. Under these documents the appellant would get all that he wants, and if the issues relating to them are decided in his favour, the consideration of the other issues becomes unnecessary.

In deciding whether the appellant takes under the will, the first question raised is, whether the properties dealt with by it are alienable by will. Some of these properties are found by the Judge to be the self-acquired properties of the late Rajah. As to these, the question does not arise; they are clearly alienable by will. The question concerns only those properties which we assert, and which the Judge finds, to be impartible. That they are impartible is shown by overwhelming evidence. Being impartible they are alienable. In *Sartaj Kuari* v. *Deoraj Kuari* (1) followed in *Beresford* v. *Rama Subba*(2), and *Siva Subramania Naicker* v. *Krishnammal* (3), it was held that the holder of impartible property might dispose of it by gift, unless there was anything in the tenure on which it was held restraining alienation, or unless there was a custom against alienation. The District Judge finds that the zemindari was in its origin a military or feudal estate, and that consequently there is "something in the tenure of the estate, that prevents the holder from bequeathing it *en bloc* to a stranger." The finding that the estate was in its origin military or feudal is not supported by the evidence. But even if the Judge is right

(1) 10 A. 272. (2) 13 M. 197. (3) 18 M. 287.

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in fact, that does not render the estate inalienable now, since it is held under a sanad granted under Madras Regulation XXV of 1802. If the tenure imposes a restraint upon alienation, that restraint must be imposed for the benefit of the grantor of the tenure, who, in the case of a military or feudal tenure, would be the Government. But the Regulation, by Section 8 allows an estate held under a sanad to be alienated, at least as against the Government. As to a custom restraining alienation, if the respondent relies upon such a custom, it is for him to prove it. *Sartaj Kuari* v. *Deoraj Kuari* (1) *Siva Subramania Naicker* v. **[175]** *Krishnammal*(2). But he has failed to do so. The impartible properties therefore come within the rule laid down by the Privy Council in *Sartaj Kuari* v. *Deoraj Kuàri*(1) and are alienable. But it was attempted to distinguish this case on the ground that it referred only to an alienation *inter vivos*; and it is said that it does not follow that, because an estate is alienable *inter vivos*, it is alienable by will. *Sartaj Kuari* v. *Deoraj Kuari* (1) was however a case of gift *inter vivos*, and it is contended that the power of bequest is co-extensive with the power of gift *inter vivos*. In *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (3), Willes, J., in delivering the judgment of the Privy Council, said: "The law of wills has, however, grown up, so to speak, " naturally from a law that furnishes no analogy, but that of gifts ; and " it is the duty of a tribunal dealing with a case new in the instance to be " governed by the established principles and the analogies which have " heretofore prevailed in like cases . . . . The analogous law in this " case is to be found in that applicable to gifts, and even if wills were not " universally to be regarded in all respects as gifts to take effect upon " death, they are generally so to be regarded as to the property which they " can transfer and the persons to whom it can be transferred." This " principle was applied in *Vallinayagam Pillai* v. *Pachche* (4) and *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (5) and *Venkata Rama Rau* v. *Venkata Suriya Rau* (6). No doubt this impartible property is ancestral, but that does not prevent it being disposed of by will, if the owner is a sole owner. What prevents ancestral estate or a share in ancestral estate being disposed of by will is the existing rights of other members of the coparcenary. *Vitla Butten* v. *Yamenamma* (7), *Lakshman Dada Naik* v. *Ramachandra Dada Naik* (8), *Rathnam* v. *Sivasubramania* (9). Therefore, when, as in this case, there are no rights in the property belonging to any other members of the co-parcenary, there is no restraint on alienation by will. Under the ruling of the Privy Council in *Sartaj Kuari* v. *Deoraj Kuari* (1), the holder of impartible property is exactly in the position of a sole owner of ancestral property ; and **[176]** his sons having no right in the property cannot veto any disposition by will. They may have rights to maintenance, but this does not give them a right to object to a bequest of the property. A widow has a right to maintenance out of ancestral property, but she has not, on that account, a right to veto an alienation of it by will. *Vallinayagam Pillai* v. *Pachche* (4).

The District Judge has held that the late Rajah was precluded by the document of October 1873 from alienating the estate as against the respondent. But this is not so. *Rungama* v. *Atchama* (10), *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (11).

(1) 10 A. 272. (2) 18 M. 287. (3) 9 B.L.R. 377.
(4) 1 M.H.C.R. 326. (5) 12 M.I.A. 1. (6) 1 M. 281 = P.C. 2 M. 333.
(7) 8 M.H.C.R. 6. (8) 5 B. 48. (9) 16 M. 353.
(10) 4 M.I.A. 1. (11) 10 M.I.A. 279.

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The property being alienable by will and the late Rajah not being precluded from alienating it by the document of the 1st of October 1873, the next question raised is whether the appellant, assuming him not to be the avurasa son of the late Rajah, is precluded from taking under the will. On this point the District Judge has not found against the appellant, and it is only necessary to point out that the respondent's case is that the late Rajah knew that the appellant was not his son.

The Advocate-General (Hon'ble Mr. *Spring Branson*), with him Mr. *Wedderburn*, *Rama Rau*, *Ananthacharlu*, *Gopalasami Ayyangar* and *Grant*, for respondent.

We can hardly contend that the properties found by the District Judge to be impartible are not so. But we say that they are inalienable by reason of the tenure on which they are held and by custom. The evidence shows that the estate at its origin was held on military tenure. And if it was so at its origin, it must be so still. The grant of a sanad under Madras Regulation XXV of 1802 does not alter the tenure under which the estate was originally granted. A sanad granted under that Regulation fixes the peishcush, but does not alter any of the incidents attaching to the estate. *Muttayan Chetti* v. *Sivagiri Zemindar* (1). If the estate is held on military tenure a custom of inalienability must follow.

Assuming, however, that the estate is not inalienable by tenure or by custom, we contend that the late Rajah could not dispose of it by will. *Sartaj Kuari* v. *Deoraj Kuari* (2) shows that he could [177] have disposed of it in his life-time by gift, but it does not therefore follow that he could dispose of it by will. No doubt, as was said by the Privy Council in *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (3), there is an analogy between the power of disposition by gift *inter vivos* and the power of disposition by will. But the power of testamentary disposition by a Hindu is an anomaly, and therefore ought not to be pressed too far *per* Holloway, J., in *Gooroova Butten* v. *Narrainsawmy Butten* (4), see too the judgment of the Privy Council in *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (5). The argument of the appellant is that a man may by will dispose of whatever he may give away in his life time. But this is not so. This doctrine is questioned by Markby, J., in *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*(6) and in the judgment in *Tara Chand* v. *Reeb Ram* (7), and it is expressly denied by Holloway, J., in *Gooroova Butten* v. *Narrainsawmy Butten* (4), see too *Jarman on Wills* (8). As an instance where the power of bequest falls short of the power of gift *inter vivos* the case of an alienation by a widow may be referred to *Jushada Raur* v. *Juggernaut Tagore*(9) and *Gurivi Reddi* v. *Chinnamma* (10). The question whether a Hindu may dispose of property by will depends upon whether he is a joint or separate owner of that property. In the cases where an alienation by will has been upheld, it has been on the ground that the testator was the separate owner of the property. In *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty* (11) the testator was the separate owner of the ancestral property. In *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (12), the decision was based on the ground that the property was the separate self-acquired property of the testator. In *Vallinayagam Pillai* v. *Pachche* (13), the property was

(1) 3 M. 370. (2) 10 A. 272. (3) 9 B.L.R. 377.
(4) 8 M.H.C.R. 13. (5) 5 B. 48(62). (6) 2 B.L.R. O.C.J. 11 (41).
(7) 3 M.H.C.R. 50 (55). (8) Vol. I, p. 48, Fifth edition.
(9) 2 Morley's Digest, 67. (10) 7 M. 93.
(11) 6 M.I.A. 309. (12) 12 M.I.A. 1. (13) 1 M.H.C.R. 326.

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ancestral, but the testator was the separate owner of it. Now in this case the testator was not the separate owner of the impartible property; that property was joint property, for impartibility does not render the ownership separate. In *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (1) it was laid down that the ownership of a **[178]** co-parcener in sole possession of an impartible estate is not separate ownership. And this was followed in *Subramanya Pandya Chokka Talavar* v. *Siva Subramanya Pillai* (2). In *Neel Kisto Deb Burmono* v. *Beer Chunder Thakoor* (3) it is said that there can be no community of interest in an impartible estate. But this rule does not apply to Madras *Naraganti Achammagaru* v. *Venkatachellapati Nayanivaru* (1). As to impartible property being also joint property, see also *Katama Natchiar* v. *The Rajah of Shivagunga* (4) *Maharani Hiranath Koer* v. *Baboo Ram Narayan Singh* (5), *Stree Rajah Yanumula Venkayamah* v. *Stree Raja Yanumula Boochia Vankondora* (6), *Sivagnana Tevar* v. *Periasami* (7), *Jogendra Bhupati* v. *Nityanand Man Singh* (8).

Moreover, on the death of the Rajah the estate passed by survivorship to the respondent. *Jogendra Bhupati* v. *Nityanand Man Singh* (8), *Subramanya Pandya Chokka Talavar* v. *Siva Subramanya Pillai* (2). And this right of survivorship defeats any testamentary disposition of the Rajah, *Vitla Butten* v. *Yamenanna* (9), *Jarman on Wills* (10); see also *Almi* v. *Komu* (11). Assuming, however, that the properties were such as were alienable by will, the agreement of October 1st, 1873, precluded the Rajah from alienating them as against the respondent.

But even if the Rajah was at liberty to dispose of the properties, the question arises whether under the will the appellant can take. We contend that on a true construction of the will the Rajah intended the appellant to take only in the character of his avurasa son, and therefore as the appellant is not his avurasa son the bequest fails, *Fanindra Deb Raikal* v. *Rajeswar Das* (12), *Doorga Sundari Dossee* v. *Surendra Keshav Rai* (13), *Karsandas Natha* v. *Ladkavahu* (14), *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee* (15). Whether the Rajah knew the appellant not to be his son is immaterial so long as the appellant was not his son, *Godfrey* v. *Davis* (16).

*Bashyam Ayyangar* in reply—

**[179]** On the last question, if the Rajah knew that the appellant was not his avurasa son, the misdescription goes for nothing *Pratt* v. *Mathew* (17), *Schloss* v. *Stiebel* (18), *Doed Gains* v. *Rouse* (19). To disentitle the legatee to take under the will, he must have fraudulently induced the testator to believe that he bore the character which the testator attributed to him, *Rishton* v. *Cobb* (20). *In re Petts* (21), *In re Boddington* (22), *Jivani Bhai* v. *Jivu Bhai* (23). Further, the evidence shows that the testator called the appellant his avurasa son and treated him as such: see *Pratt* v. *Mathew* (17) and *Laker* v. *Hordern* (24).

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(1) 4 M. 250. (2) 17 M. 316. (3) 12 M.I.A. 523.
(4) 9 M.I.A. 539, 543. (5) 9 B.L.R. 274. (6) 13 M.I.A. 333.
(7) 1 M 312 = sub. nom. *Periasami* v. *Periasami*, 5 I.A. 61.
(8) 18 C. 151. (9) 8 M.H.C.R. 6.
(10) Vol. I, p. 48, fifth edition. (11) 12 M. 126. (12) 11 C. 463.
(13) 12 C. 686. (14) 12 B 185. (15) 3 I. A. 253.
(16) 6 Ves. 43. (17) 22 Beav. 328 at p. 334.
(18) 6 Sim. 1. (19) 5 C.B. 422. (20) 5 My. & C. 145.
(21) 27 Beav. 576. (22) L.R. 22 Ch. D. 597.
(23) 2 M.H.C.R. 462. (24) L.R. 1 Ch. D. 644.

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The Advocate-General, in replying on the fresh authorities cited, referred to *Hill* v. *Crook* (1), *Abbu* v. *Kuppammal* (2); *In re Hall* (3).

JUDGMENT.

This is an appeal against the decision of the District Judge who has decreed in favour of the plaintiff's right to succeed to the ancient Zamindari of Pittapur in the Godavari District. The plaintiff claims as the adopted son of the late Rajah of Pittapur. As such he claims to recover the estate and effects of his adoptive father. The appellant alleges himself to be the natural-born son of the late Raja, it being said that his birth took place in the month of October 1885—some twelve years after the date of the plaintiff's adoption. The adoption of the plaintiff in 1873 is admitted. The defence is rested on two independent grounds: *Firstly*, it is said that the appellant is entitled to succeed in virtue of his being the natural-born and legitimate son of the deceased Raja by his first wife Mangayamma, and *secondly*, it is said that the late Raja left a will bequeathing to the appellant practically his whole property, making some provisions for the adopted son and other members of the family.

The District Judge has found in favour of the plaintiff with regard to both these points. He has found that the appellant is not the son of the late Raja nor of the Raja's wife. He has also found that, although the late Raja did make three wills, all being to the same effect, so far as the question in this case goes, those wills are not valid and operative as against the plaintiff. Mr. Bashyam Aiyangar, who argued the case on behalf of the [180] appellant, was prepared to impugn both these findings. But, as he was satisfied with the disposition of property made in the Raja's wills, he was content with a decision on the question of their validity if that question was decided in his favor. His position was that, whether his client was the son of the late Raja or not, he was entitled to the Raja's property as bequeathed under the wills. We proceed then to consider whether these wills of the Raja are valid against the plaintiff. That the three wills were duly executed by the late Raja on the 16th February 1889, 7th September 1889 and 17th March 1890, respectively, is a fact found by the District Judge and not disputed. It may be a question whether the last of these three wills supersedes the other two. The third issue relates to this question, and it is one which may have to be decided in some future suit, inasmuch as there is a variance between the gifts made in the first two papers and those made in the last. For the purpose of the present case it appears to us unnecessary to decide the question, inasmuch as there is a complete disposition of the property in favour of the appellant as well under the last will as under the first two. The plaintiff, the present respondent, impugns these wills on several grounds in order to avoid the application of the principle laid down by the Judicial Committee in *Sartaj Kuari* v. *Deoraj Kuari* (4). It has been alleged on behalf of the respondent that the zemindari of Pittapur is not an impartible zemindari, and further, that, if it be an impartible zemindari, it is a zemindari which, according to the custom or in virtue of the tenure upon which it is held, is inalienable. The sixth and eighth issues were framed with reference to these contentions. With regard to the question of impartibility (the sixth issue), the finding of the District Judge is in the appellant's favour. He finds that the property comprised in Schedules I

(1) L.R. 6 H.L. 265.
(2) 16 M. 355.
(3) L.R. 35 Ch. D. 551.
(4) 10 A. 272.

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and II, that is, the zemindari and the accretions thereto, are impartible. We were referred by Mr. Bashyam Aiyangar to numerous documents, proving, in our opinion, beyond all doubt that the estate has always been regarded as impartible. In family arrangements made in 1845 and 1869 (Exhibits CCIX and CCCVII) it was so treated. In the course of the descent which is traced back for several generations to the original holder (Exhibit CCCXXI) there are several instances in which, on the [181] death of the holder of the zemindari, there was a plurality of legal heirs, and yet only one succeeded to the estate. The zemindari was treated as admittedly impartible in the litigation to which the present plaintiff was a party (Exhibits CCLXXXIV and XII). It is not necessary, however, to elaborate this point, because the Advocate-General who appeared for the respondent, practically abandoned it.

Upon the contention raised by the eighth issue that the zemindari is by custom or in virtue of its tenure inalienable, the District Judge finds that the zemindari was in its origin a military or feudal estate. The only evidence in support of this finding to which we were referred consists of statements by the late Raja that he placed at the disposal of the Government in 1879-1880 some armed men on account of the disturbance in Rumpa. There is no evidence as to the circumstances under which this was done. It is suggested by the Advocate-General that there may be more evidence as to the nature of the tenure in the possession of the Court of Wards, and that they ought to have disclosed it to the Court. The answer to this is that the burden of proving that the estate was held by military or *quasi* feudal tenure lay upon the plaintiff, and that it was competent to his advisers to elicit from the Court of Wards any information with regard to the history of the zemindari which might be in their possession. Apart from the suggestion that the zemindari was held on military tenure, it is not contended that there was any evidence to prove that the zemindari was by custom inalienable. On the other hand, Mr. Bashyam Aiyangar refers to numerous instances in which grants in perpetuity of portions of the zemindari have, from time to time, been made (Exhibits CCLXXIX and DQ series). The Exhibits marked CCLXXIX relate to such alienations prior to the permanent settlement; the others are subsequent thereto. As, in our opinion, there is no evidence that the estate was ever held on military tenure, it is not necessary to consider whether the nature of the tenure—if it had been military in its origin—would have been affected by the permanent settlement of the estate under Regulation XXV of 1802. For these reasons we have come to the conclusion that the District Judge was wrong in his finding of fact upon the eighth issue.

The question now follows whether the estate being without doubt impartible and not shown to be inalienable either by custom [182] or otherwise, the principle laid down in the case above cited is applicable. It was decided in that case that the property in the paternal or ancestral estate acquired by birth under the Mitakshara law is so connected with the right to a partition that it does not exist where there is no right to a partition. In the absence of co-ownership their Lordships held that there was no restraint upon the father's power of alienation. The case has been considered more than once by a Division Bench of this Court, and there can be no doubt that we are bound to act upon the doctrine explicitly laid down by the Judicial Committee (See *Beresford* v. *Ramasubba* (1) and *Sivasubramania Naicker* v. *Krishnammal* (2)). There are, it is true, cases

(1) 13 M. 197. (2) 18 M. 287.

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prior to 1888 in which expressions were used which point to another view of the law: *Katama Natchiar* v. *The Rajah of Shivagunga* (1), *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (2), *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora* (3), *Maharani Hiranath Koer* v. *Baboo Ram Narayan Sing* (4), *Sivagnana Tevar* v. *Periasami* (5). But we must now take it that in those cases as well as in the later case of *Jogendro Bhupati* v. *Nityanand Man Sing* (6), a distinction is to be made between a matter of succession by inheritance and a question of alienability. This distinction is clearly marked by the Judicial Committee itself in *Sartaj Kuari's* case (7). The decision is a clear authority to the effect that the Rajah could legally have alienated the whole or any part of the estate by gift or otherwise during his life time. It is contended, however, that what a Hindu can alienate by gift *inter vivos* he cannot always alienate by a testamentary disposition. The Advocate-General combated the proposition that a Hindu can alienate by will all that he can dispose of by gift *inter vivos*. There is a strong body of authority in support of the proposition that the two powers are co-extensive, *Vallinayagam Pillai* v. *Pachche* (8), *Ganendra Mohan Tagore* v. *Upendra Mohan Tagore* (9), *Jatindra Mohun Tagore* v. *Ganendra Mohan Tagore* (10), *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty* (11), *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (12). Cases were cited [183] in which learned Judges have thrown doubt upon the universality of this proposition *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*(13), *Krishnaramani Dasi* v. *Ananda Krishna Bose*(14), *Tara Chand* v. *Reeb Ram* (15), *Gooroova Butten* v. *Narrainsawmy Butten* (16). The weight of authority is, however, strongly in favour of the proposition above mentioned. In Baboo *Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (12), the Judicial Committee say as follows:—"Decided cases too "numerous to be now questioned have determined that a testamentary "power exists and may be exercised at least within the limits which the "law prescribes to alienations by gift *inter vivos*." An attempt was made to show that there were cases in which a Hindu could not bequeath by will what he could give away *inter vivos*, and the case of a Hindu widow disposing of her savings was cited as an instance. It is answered that the question of a widow's right to dispose of her property by will depends upon the nature of the property —whether it is such that she could give it away by gift *inter vivos*. No case has been cited in which a widow has been held incapable of bequeathing by will property which she could otherwise legally dispose of. No principle is suggested on which a distinction can be rested between the extent of the power of giving by will and of giving *inter vivos*.

The cases relating to the disposition by will of an undivided share of a coparcenary property, really support the proposition that the powers of giving and bequeathing are co-extensive. In *Vitla Butten* v. *Yamenamma* (17), it was held that a Hindu could not alienate by will his undivided share of coparcenary property, and thus defeat his son's

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(1) 9 M.I.A. 539 (543). (2) 12 M.I.A. 523. (3) 13 M.I.A. 333.
(4) 9 B.L.R. 274.
(5) 1 M. 312 = sub. nom. *Periasami* v. *Periasami*, 5 I.A. 61.
(6) 18 C. 151. (7) 10 A. 272. (8) 1 M.H.C.R. 326.
(9) 4 B.L.R. O.C.J. 103. (10) 9 B.L R. 377. (11) 6 M.I.A. 309.
(12) 12 M.I.A. 1. (13) 2 B. L. R. O. C. J. 11.
(14) 4 B. L. R. O. C. J. 231. (15) 3 M.H C.R. 50. (16) 8 M.H. C. R. 13.
(17) 8 M. H. C. R. 6.

coparcenary right. When that case was decided the view, since overruled (*Baba* v. *Timma* (1), was entertained that a Hindu, under like circumstances, could make a gift *inter vivos* of his undivided share of family property. Dealing with these decisions the Judicial Committee in *Lakshman Dada Naik* v. *Ramachandra Dada Naik* (2) use the following language: "The reasons for making this "distinction between a gift and a devise are, that the coparcener's power of "alienation is founded on his right to a partition; that that right dies "with him; and, that the title of his co-sharers by survivorship vesting "in them at the [184] moment of his death, there remains nothing upon "which the will can operate." In Bombay it should be mentioned, a different view as to a coparcener's power of disposition had been taken. The High Court there had held that a coparcener could not either give or devise his share without the consent of his co-sharers. Referring to this the Judicial Committee go on to observe "Their Lordships do not think "it necessary to decide between the conflicting authorities of the Bombay "and the Madras High Courts in respect of alienations by gift, because they "are of opinion that the principles upon which the Madras Court has decided "against the power of alienation by will are sound, and sufficient to "support that decision." The doctrine here approved, that it is the right to a partition which puts a restraint on the coparcener's power of alienation, is the very doctrine enunciated in *Sartaj Kuari* v. *Deoraj Kuari*(3). The case of *Lakshman Dada Naik* v. *Ramchandra Dada Naik*(2) decides that, where there is a right to a partition subsisting in one coparcener, the power to bequeath his share cannot be exercised by another coparcener. In *Sartaj Kuari* v. *Deoraj Kuari* (3) the negative proposition is asserted that, where the right to a partition is wanting, there is no restraint on the power of alienation. Seeing that in their judgment in the same case (*Sartaj Kuari* v. *Deoraj Kuari* (3)) the Judicial Committee cited the *Hansapur* case (4) in which the disposition was a testamentary one, we cannot suppose that they intended to restrict their decision to the case of gifts *inter vivos*. The conclusion at which we arrive is that, as the late Raja was capable of disposing of his estate by gift to a stranger, notwithstanding the existence of a son, so there is nothing to prevent his dealing with it by way of testamentary disposition.

We come now to consider the question raised by the fifth issue. This issue appears to have been framed with respect to an allegation made in the fifth paragraph of the plaint. Reference is there made to an adoption deed, dated the 1st October 1873. In point of fact there is no such deed, and it is not alleged in the plaint that, apart from the document bearing date the 1st October 1873, there was any contract between the plaintiff's natural father and the late Raja on the occasion of the plaintiff being given in adop- [185] tion to the late Raja. The document of the 1st October 1873 (Exhibit DE) was executed some few days after the ceremony of adoption took place. This document evidences nothing more than a concession made by the late Raja with regard to the retinue of his adopted son and to the access to him of the members of his natural family. It is true that, by way of recital, it is stated in the document that the boy has been adopted and constituted the heir to the zemindari and its appurtenances. These words state nothing more than the legal

(1) 7 M. 357. (2) 5 B. 48. (3) 10 A. 272.
(4) *Baboo Beer Pertab Sahee* v. *Maharaja Rajender Pertab Sahee*. 12 M.I.A. 1.

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consequences of the plaintiff's adoption. It cannot be pretended that they in any way restrain the adoptive father in the exercise of his powers of alienation. It might as well be said that the Raja had precluded himself from prejudicing the rights of his adopted son by begetting a natural son. Language far stronger was used by the adoptive father in the case of *Rungama* v. *Atchama* (1) and yet it was held that he had not disabled himself from disposing of the property without the consent of his adopted son. There being no evidence and, as we have said, no allegation even of anything in the nature of a contract or a settlement, we must hold that there was nothing in the provisions of the document of the 1st of October 1873 to preclude the Raja from disposing of his property as he pleased, so long as he did not evade the obligation to maintain the appellant. That obligation is recognised in the wills.

It remains to deal with the contention which is raised under the fourth issue. The issue is not happily worded, but we are told that it is meant to raise the question whether, by reason of the mere fact that the appellant is not the son of the testator, he is precluded from taking the estate under the will. For the purposes of this issue we are assuming that the appellant is, as found by the District Judge, not the son of the late Raja. It is contended that the Raja's expressed intention was to give the estate to his begotten son, and that the gift must fail if, in point of fact, the appellant does not answer to that description. In the plaint the allegation in respect of this matter is that the Raja, in or about October 1885, announced that his wife had been delivered of a son, namely, the appellant, and that this assertion on his part was false and fraudulent and set up to deprive the plaintiff of his rights as an adopted son. From this allegation in the third **[186]** paragraph of the plaint and the plaintiff's own evidence as also from the opening of the plaintiff's vakil in the Court below and from the conduct of the case in that Court, it is abundantly clear that the plaintiff's case was that the Raja was himself a party to the conspiracy by which the appellant was introduced into the family as his son, he being in fact a stranger. There is nothing to indicate that the Raja was under any mistake about the matter, and still less that he himself was the victim of the alleged fraud. The Judge apparently accepts this view of the case in paragraph 123 of his judgment. These being the circumstances, the cases cited to us, in which the testator was either under a misapprehension or was deceived, are wholly inapplicable. In the class of cases to which *Fanindra Deb Raikat* v. *Rajeswar Das* (2) belongs, the testator made a gift to a certain person under the belief that he filled a certain character, and the language of his will showed that his intention was that the person named should take the gift only in that character. In such cases it has been held that, when the testator turns out to have been mistaken, the gift must fail, because the presupposed condition does not exist. It was argued that, notwithstanding the fact that the testator, the Raja, was under no mistake, the will still showed that his intention was that the appellant, as his begotten son, and only as begotten son, should take under it. It is contended that, by his reference to the Hindu law and by his constant repetition of the word avurasa son, the Raja evinced his clear determination to make his will in harmony with Hindu opinion, which might be scandalized if he had given away his property to a stranger. Having regard to the admitted fact that the Raja knew

(1) 4 M.I.A. 1. (2) 11 C. 463.

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that the legitimacy of his putative son was disputed, we are asked to say that he intended the appellant to take only in the event of his claim as son being established by a Court of law. A somewhat similar argument was used by Sir George Jessel as Counsel for the appellant in *Hill* v. *Crook* (1). There the testator bequeathed certain property on trust for his "daughter Mary, the wife of the said John Crook" for her life, John Crook in the former part of the will having been described as the testator's son-in-law, and after the decease of his said daughter, Mary Crook, he directed that his property should remain upon trust for the benefit of the children of **[187]** his said daughter Mary Crook. It appeared that John Crook had first married another daughter of the testator and that, upon her death, he had gone through a form of marriage with the testator's daughter Mary. This daughter Mary was, therefore, not the legal wife of John Crook, and her children were not her legitimate children. There was in fact a double misdescription, for *prima facie* according to English law "children" imports legitimate children. The children of Mary Crook were reputed and known as her children. So, in the present case, we have been referred to evidence showing that the appellant was introduced to the Raja's friends as his child and that the usual ceremonies for a child were performed by the Raja. It was held in *Hill* v. *Crook* (1) that the children of Mary Crook were as clearly pointed to by that description as if they had been mentioned by name. There can be still less doubt where, as in the present will, the actual name of the donee is also given. All that can be said with regard to this will is that, if the appellant is not the son of the late Raja, there has been a misdescription of him in the will. It cannot be said that there is any possible doubt as to the identity of the person intended by the testator. We may refer to the case of *Schloss* v. *Stiebel* (2) cited in the argument, where the testator who was betrothed to a lady and intended to marry her in a few days, made a codicil in her favour describing her as his wife. Although he died before marrying her, it was held that the lady was entitled to the legacy. That case, like the present, illustrates the general doctrine that a false description does not by itself vitiate the legacy. In *Kennell* v. *Abbott* (3) the Master of the Rolls, citing the passage from the Digest [Book XXXV, t. 1., l. 72, s. 6], says that the meaning of it is "that a false "reason given for the legacy is not of itself sufficient to destroy it." If there is an adequate description of the person intended to take, the erroneous addition of words of description is immaterial. This is the case even where the error is unintentional, the true fact being unknown to the testator. *A fortiori* it must be so where the testator, for some reason of his own, uses words which he knows to be inapplicable. His description of the appellant as his avurasa son, which we are assuming to have been intentionally erroneous, we are disposed to attribute to a desire on his part to **[188]** strengthen the position of his intended beneficiary, who, we must repeat, had after all been treated by him as his son. The frequency of the use of the term '*avurasa*' is, in our opinion, fully accounted for by the need of distinguishing the *avurasa* from the *dattaka* or adopted son. It may be noticed that in each of the wills the full name of the adopted son and of the avurasa son is given only once and in other places the descriptions *avurasa* and *dattaka* are used in juxta-position.

On this part of the case, we find that the testator's intention was undoubtedly to give the estate to the appellant irrespective of his claim to

(1) L.R. 6 H. L. 265. (2) 6 Sim. 1. (3) 4 Ves. 802.

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the title of son. No fraud or deception was practised upon the testator. He was under no misapprehension as to the facts. He used language which can apply to no one but the appellant, and therefore his gift must take effect.

To recapitulate, our findings are (i) that the zamindari of Pittapur is an impartible estate ; (ii) that there is no proof that it is inalienable either by custom or by reason of the tenure ; (iii) that the estate thus being alienable *inter vivos* according to the decision in *Sartaj Kuari* v. *Deoraj Kuari* (1) it was equally alienable by will ; (iv) that the late raja's will is not void as being in conflict with any contract or settlement made by him in the plaintiff's favour ; and (v) that the appellant, whether or not he was the son of the testator, is the *persona designata*.

Having come to these conclusions in favour of the appellant, we deem it unnecessary to proceed further with the appeal. The enquiry into the matter of the legitimacy of the appellant would entail a mere waste of the time of the Court for a great number of days, besides causing needless expense to the parties, for in the result their position with regard to the property would not, in the view we have taken of the validity of the will, be altered by the decision at which we might arrive on the other question.

We must allow the appeal and reverse the decree of the District Court and dismiss the suit.

We have considered the question of costs. We think that, as the plaintiff has provoked an enquiry into the legitimacy of the appellant which, unless he succeeded in impeaching the Raja's wills, was vain, he ought to pay the ordinary costs of the litigation. By ordinary costs we mean the costs incurred under the [189] Court Fees' Act for stamp duties, and under the Legal Practitioners' Act for pleader's fees, and the printing and translation charges in this Court. Other costs incurred by the parties themselves, such as the costs of the Commissions for the examination of witnesses and of printing papers done outside the Court, must be borne by the party who incurred them.

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**20 M. 189 (F.B.) = 7 M.L.J. 167 = 2 Weir 120, 142, 144 & 763.**

## APPELLATE CRIMINAL—FULL BENCH.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Shephard, Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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## QUEEN-EMPRESS *v.* ARUMUGAM AND OTHERS.*

[17th September and 7th October 1896, and 23rd February and 30th April, 1897.]

*Occurrence Reports—Charge sheets—Right of an accused to copies of, before trial—Criminal Procedure Code, Sections* 157, 168, 173—*Public documents—Indian Evidence Act, Section* 74—*Right to inspect and have copies—Indian Evidence Act, Section* 76.

*Held*, by the Full Bench (SUBRAMANIA AYYAR, J., *dissentiente*).—Reports made by a Police officer in compliance with Sections 157 and 168 of the Criminal Procedure Code are not public documents within the meaning of Section 74 of

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* Criminal Revision Case No. 328 of 1896.

(1) 10 A. 272.

the Indian Evidence Act, and consequently an accused person is not entitled, before trial, to have copies of such reports.

*Held*, by COLLINS, C.J., and BENSON, J.—The same rule applies to reports made by a Police officer in compliance with Section 173 of the Criminal Procedure Code.

*Held*, by SHEPHARD and SUBRAMANIA AYYAR, JJ.—Reports made by a Police officer in compliance with Section 173 of the Criminal Procedure Code, are public documents within the meaning of Section 74 of the Indian Evidence Act, and consequently an accused person, being a person interested in such documents, is entitled by virtue of Section 76 of the Indian Evidence Act, to have copies of such reports before trial.

[F., 31 C. 284 (293)=8 C.W.N. 132; R., 30 M. 466 (467)=6 Cr.L.J. 346=17 M.L.J. 471=3 M.L.T. 14.]

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CASE referred for the orders of the High Court under Section 438 of the Code of Criminal Procedure, by G. T. Mackenzie, Acting Sessions Judge of Coimbatore.

The case was stated as follows :—

" The accused in the case applied for copies of the Village Magistrate's "report, complaint, police occurrences and charge [190] sheet, medical "certificate and statements of complainant, in order that they might know "the nature of the case against them and also to enable them to cross-"examine the witnesses for the prosecution.

" The Magistrate passed the following order :—

" 'Grant copy of complaint, medical certificates and statements only.' "From this it appears that copies of occurrence reports and charge sheets "were refused.

" The accused then moved the Sessions Court in Criminal Revision "Petition No. 9 of 1896, on which Mr. Desikachariar, High Court Vakil, "was heard. He asked this Court to order the Magistrate to grant these "copies.

" My attention was drawn to a memorandum which the District "Magistrate of Coimbatore published in the District Gazette of March 7th.

" 'The attention of all Magistrates is drawn to the High Court Ruling "in *Queen-Empress* v. *Venkataratnam Pantulu* (1), copies of charge sheets "and occurrence reports should not be granted to the accused prior to the "completion of the trial of a case.'

" I held that I have no power to interfere with the magistracy in "this matter, and that if I had the power to interfere, *Queen-Empress* v. "*Venkataratnam Pantulu* (1) would prevent me. Mr. Desikachariar then "asked me to refer the order made under Section 458.

" My own opinion is that everything which is before the Magistrate "or Judge ought to be known to the accused. The special privilege which "Section 172 gives to diaries may have a reason inasmuch as diaries may "refer to other cases also. But I read with the utmost astonishment the "remark of the Chief Presidency Magistrate in *Queen-Empress* v. *Venkata-*"*ratnam Pantulu* (1), that charge sheets contain good deal of information "for use of the Magistrate which the defence is not allowed to see.

" Also I am unable to understand the exact force of the words 'at "the present stage' in the decision of the High Court. The Chief Presi-"dency Magistrate refused copies 'before the trial,' so the High Court "may mean that copies must be given when the trial has commenced or "when a charge has been [191] framed. But the District Magistrate of "Coimbatore understands the High Court to mean that copies need not

(1) 19 M. 14.

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"be given until the trial is over, by which time it will be too late for "accused to make any use of them. It is to be observed that the Code "says nothing about different stages of the proceedings in this connection, "and it seems to me that if an accused is entitled to a copy at last he is "entitled to it at first.

"The point is of general importance. There is hardly a case at "Sessions in which the defence does not scrutinize the first report from "the Village Magistrate, the first occurrence report sent in by the Station-"house officer, and the charge sheet."

The Public Prosecutor (Mr. *Powell*), for the Crown.

*Krishnasami Ayyar*, for the accused.

This reference was heard before SUBRAMANIA AYYAR and DAVIES, JJ., who made the following

## ORDER OF REFERENCE TO THE FULL BENCH.

The question raised in this case is whether the accused was, at the time he applied for copies for certain police reports including a charge sheet submitted to the Magistrate before whom he stood charged, entitled to obtain the copies for defending himself in respect of the offence of which he was accused.

Now there can be no doubt that the papers in question are public documents within the meaning of Section 74 of the Indian Evidence Act, since they are records of the acts of public officers submitted by them as required by law (Sections 157, 168 and 173, Code of Criminal Procedure), or in the discharge of their official duty, and it is equally undoubted that, under Section 76 of the Evidence Act, the accused would be entitled to the copies, if the documents are such as the accused has a right to inspect.

Though there appear to be no express legislative provisions with reference to the question under consideration, yet it is perfectly clear that, in the eye of the law, every person has a right to inspect public documents, subject to certain exceptions, provided he shows he is individually interested in them (Taylor on Evidence, 9th Edition, Section 1492, Vol. II, page 992). In *Mutter* v. *The Eastern and Midlands Railway Company* (1), Lindley, L. J., with the concurrence of the Lords Justices Cotton and Bowen, laid down the rule thus :—"When the right to inspect and take a **[192]** copy is expressly conferred by statute, the limit of the right depends on the true construction of the statute. When the right to inspect and take a copy is not expressly conferred, the extent of such right depends on the interest which the applicant has in what he wants to copy and on what is reasonably necessary for the protection of such interest. The common law right to inspect and take copies of public documents is limited by this principle as is shown by the judgment in *Rex* v. *Justices of Staffordshire* (2)." In the case mentioned by the Lord Justice, Lord Denman, Chief Justice, observed that for the persons interested "Every "officer appointed by law to keep records ought to deem himself for that purpose" (for the production of documents) "a trustee."

Such being the law on the point and the applicant being unquestionably interested in documents like the present as the person accused of the charge, to the investigation of which they relate, it must be held he is entitled to inspect them and, therefore, to copies thereof under the section of the Evidence Act referred to above. In support of this view, it may

(1) L. R., 38 Ch. D. 92, (106). (2) 6 A. & E. 84 (100).

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also be pointed out that, as it cannot be denied that the accused might at his trial summon the police officer as a witness and call for and use the report in question with reference to the examination of such a witness, it stands to reason that he should be permitted to ascertain their contents in order that he may act with an accurate knowledge of all available information which may prove useful in defending himself. (See *Fox* v. *Jones* (1). The above conclusion, arrived at on general principles, appears to receive some confirmation from the provisions of Section 172 of the Criminal Procedure Code which exempts "police diaries" from being called for or seen on behalf of the accused; thus implying that reports, like those in question or other proceedings of the police, may be inspected at the instance of a person possessing the requisite interest.

We should here observe that, apart from general principles, if in any case an order has been made on a police occurrence report or charge sheet affecting the person accused, such as an order for his arrest or for his remand to custody, he is *ipso facto* entitled to a copy of that document under the express terms of Section 548 of the Code of Criminal Procedure.

**[193]** In our view, no weight should be given to the suggestion of the Public Prosecutor that to allow the accused access to documents like the present would enable them to tamper with prosecution witnesses and thus hinder the course of justice. On the contrary, it is impossible not to feel the force of the observation of Trevelyan, J., that he did not know of anything more disastrous to the administration of criminal law than that the accused should be debarred from having access to information to which he has a right and to which he is not absolutely debarred from having access by some express provision of the legislature (*Sherusha* v. *The Queen-Empress* (2)).

It was next argued that at all events the accused ought not to be furnished with the copies until the time of the trial. But it is difficult to see how, in the absence of any distinct authority so restricting the exercise of the right in question, it can be contended that the accused can be refused inspection and copy until the stage of trial is reached. If the right exists at all, the party, entitled thereto, must be held to be at liberty to claim it at any time he considers fit to do so, since obviously he is the best Judge of when the right is to be exercised. Certainly it is but natural that accused persons should desire to have and apply for copies of papers, in which they are interested, even before the trial commences and the judgment of Lord Ellenbrough, C.J., in *The King* v. *Tower* (3) shows that applications, like the present, are not premature and ought to be complied with.

The recent case of *Empress* v. *Venkataratnam Pantulu* (4) relied on by the Public Prosecutor, while seeming to recognize the right of the accused to obtain copies, would, however, seem to deny the exercise of such right at the beginning of a trial. This is not in accordance with the view taken by us. We must, therefore, refer for the decision of a Full Bench the question whether the accused had, from the moment of his accusation, a right to inspect and obtain copies of the documents in question for the purpose of his defence.

This case coming on for hearing before the Full Bench, (COLLINS, C.J., SHEPHARD, SUBRAMANIA AYYAR and BENSON, JJ.), the Court delivered the following

(1) 7 B. & C. 732 (734).
(2) 20 C. 642.
(3) 4 M. & S. 162.
(4) 19 M. 14.

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## JUDGMENTS.

[194] COLLINS, C. J.—In answering this reference to the Full Bench, I intend to follow the exact words of the reference. The question is whether the accused had, from the *moment of his accusation*, a right to inspect and obtain copies of the documents in question for the purpose of his defence. These documents are certain police reports including a charge sheet. The reference assumes that the documents are records of the acts of public officers submitted by them as required by law—see Sections 157, 168 and 173, Code of Criminal Procedure—and that they are public documents within the meaning of Section 74 of the Indian Evidence Act, and that any person interested in the subject-matter of a public document has a right to inspect it and under Section 76, Evidence Act, has also the right to have a copy of such document supplied to him; but that is really the point the Full Bench has to decide. There appears no doubt that a person accused is a person interested in the documents referred to in Sections 157, 168 and 173 of the Code of Criminal Procedure, if the reports relate to the accusation against him; and if such reports are public documents he would be entitled to inspect and have copies of such documents. I would remark that the accused person would thus be in a position to know before any evidence is given against him all the information the police have collected relating to the offence and their reasons for suspecting the accused. The accused would, if he had the above information, have every opportunity of making a successful defence—even if he was guilty—in fact he has a copy of the brief for the prosecution.

The question to be decided is, are these reports made under Section 157—the occurrence report—and Section 168—the report made by a subordinate police officer to the station-house officer—public documents, and further is the charge sheet drawn up under Section 173, a public document?

The definition of a public document is (so far as it relates to the question before me) a document forming the acts or records of the acts of a public officer. It must be conceded that a policeman is a public officer.

Section 157 enacts that if, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered to investigate, he shall forthwith *send a report of the same* to a Magistrate empowered to take cognizance of such offence upon a police report [195] and shall proceed in person or shall depute one of his subordinate officers to proceed to the spot and investigate the facts. . . . .

Now can it be said that this report is a document forming the acts or records of the acts of a public officer? I am of opinion that it is not. It is the reasons the officer in charge of the police station has for suspecting the commission of an offence.

Section 168 directs that a subordinate police officer who has made any investigation shall report the *result* of such investigation to the officer in charge of the police station. I am of opinion that reporting the result of an investigation cannot be said to be the act or record of an act of a public officer.

Section 173 directs that, after the investigation under this chapter shall be completed, the officer in charge of the police station shall forward to a Magistrate . . . a report in a prescribed form setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case

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and shall also state whether the accused person is in custody or released on his bond with or without sureties. This information, usually called the charge sheet, stands in a somewhat different position from the reports under Sections 157 and 168, and it is possible to argue that the latter portion does relate to the act or record of the act of a public officer,—*viz.*, keeping the accused in custody or releasing him on bail; but as that information would not be of the slightest use to the accused, and as in my opinion, the other information does not contain either an act or record of an act by a public officer, I hold that it is not a public document as defined by Section 74 of the Evidence Act.

The acts and record of the acts of the public officer, while the investigation against the accused is carried on, are contained in the police diary, but by Section 172, Criminal Procedure Code, the accused is not entitled to call for such diary. I give no opinion whether the accused can call for the reports and charge sheet during the progress of the trial, but I answer in the negative the question referred to the Full Bench.

I may add that I have not considered the English Criminal Procedure in relation to this case. The powers and duties of Magistrates and police are so different in India to the powers and duties of the same officials in England that I consider any reference to English Criminal Procedure unnecessary.

**[196]** SHEPHARD, J.—Neither in the Criminal Procedure Code nor in the Evidence Act is there any provision declaring or limiting the right of private persons interested in criminal proceedings to inspect documents in the hands of third parties. A right to inspect public documents is, however, assumed in Section 76 of the Evidence Act; and, having regard to the authorities cited in the order of reference, I think it may be inferred that the Legislature intended to recognize the right generally for all persons who can show that they have an interest for the protection of which it is necessary that liberty to inspect such documents should be given. Within that limit the right appears to be recognized according to the English authorities. In the present case there can be no question as to the interest of the party who claims inspection. It is plain that a person charged with an offence is legitimately interested in knowing beforehand the particulars of the charge made against him, and the names of the witnesses who are going to support it. His interest is none the less a legitimate one, because some persons might make improper use of the information so obtained. If, therefore, the documents sought to be inspected are public documents, and if they are unprotected by special privilege, it follows that the claim to inspection must be allowed. If any of the documents is not a public document, the claim must clearly be disallowed. Documents of three sorts are mentioned in the order of reference. There is the report which the officer in charge of a police station is bound, under the provisions of Section 157 of the Code, to send to the Magistrate. There is the report which a Subordinate officer is under Section 168 bound to send to the officer in charge of the station, and there is the final report which under Section 173 the officer in charge of the station has, on completing his investigation, to send to the Magistrate. Section 74 of the Evidence Act defines public documents, and if any of these reports is a public document, it must be because it forms the act or the record of the act of a public officer. Now, taking the first of them commonly called the occurrence report and applying the language of the Evidence Act, I cannot see

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how it can possibly be called a public document. In obeying the provisions of Section 157 of the Criminal Procedure Code, the police officer, as far as regards the Magistrate, does no act except the act of writing and despatching a report founded on information received by him. It is clear that this report does not form an act of the station-house officer within [197] the meaning of the Section, and it cannot be the record of an act, because there has been no act on his part to record. In popular language any report which a subordinate officer is bound to send in to his superior officer and which is not confidential may be called a public document; but the Evidence Act lends no support to this view.

It is necessary to examine the language of the 74th Section more closely in considering the report which the subordinate police officer is, under Section 168 of the Code, directed to send to station-house officer. It is a report of the result of the investigation held under the provisions of the Chapter XIV of the Code. No doubt there may, in this instance, be said to be a record of acts done by a public officer. Nevertheless, I do not think the report is a public document within the meaning of Section 74. In construing that section, I think it may fairly be supposed that the word 'acts' in the phrase "documents forming the acts or records of the acts" is used in one and the same sense. The act of which the record made is a public document must be similar in kind to the act which takes shape and form in a public document. The kind of acts which Section 74 has in view is indicated by Section 78 of the same Act. The acts there mentioned are all final completed acts as distinguished from acts of a preparatory or tentative character. The inquiries which a public officer may make, whether under the Criminal Procedure Code or otherwise, may or may not result in action. There may be no publicity about them. There is a substantial distinction between such measures and the specific act in which they may result. It is to the latter only, in my opinion, that Section 74 was intended to refer. Unless this line of distinction is drawn, I do not see where the right of discovery is to stop. If the report which a subordinate police officer sends to the station-house officer may be inspected before the trial, what is there to prevent inspection of the report which any other officer furnishes for the information of the Public Prosecutor? It is true that the police officer acts in performance of a statutory duty, but Section 74 makes no distinction between such acts and other official acts. If an investigation amounts to an act of a public officer within the meaning of that section, and the report of it is, in consequence, a public document, it practically follows that the accused is at liberty to look into the brief of the counsel for the prosecution.

[198] The charge sheet which is prepared under Section 173 of the Code stands on a different footing. When the charge sheet is sent to the Magistrate, the preliminary stage of investigation and preparation is over. Upon the receipt of it the Magistrate may, under Section 191, take cognizance of any offence that has been charged. The transmission of the charge sheet with a view to that result, accompanied by a statement as to the accused person whether he is forwarded in custody or not, may therefore properly be called an act of a public officer, and the charge sheet itself may properly be said to form a record of that act. It is only reasonable that an accused person should, when once the Magistrate is seized of the case, have access to the report stating the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case. On the other hand, there are good and obvious reasons why, in the case of communications

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prior to that stage between police officers themselves, or between such officers and the Magistracy—communications which may or may not result in a charge and may relate to third parties and extraneous matters, discovery should not be allowed.

The conclusion at which I arrive is that an accused person is entitled to inspect, and, therefore, to have a copy of the charge sheet before the trial, but that he is not entitled to inspect the other documents. Whether he is entitled to call for them at the trial is a different question with which we are not now concerned. It was on that question that the cases in *Sheru Sha* v. *Queen-Empress* (1), *Bikao Khan* v. *Queen-Empress* (2) turned.

SUBRAMANIA AIYAR, J.—The further consideration, which I have bestowed on the question referred for decision, has not led me to think that the view, expressed in the order of reference, is erroneous. But some arguments, not urged before Davies, J., and myself prior to the date of the reference, have been advanced since and the most important of them call for some notice.

One of the arguments is that a right, similar to that put forward now on behalf of the accused, does not exist in England. But this ignores an essential difference which exists between the circumstances of the police in England and of the police in this country. There the law does not sanction an investigation by the **[199]** police as is allowed by the Code of Criminal Procedure here. This is pointed out by Sir James Stephen in the History of Criminal law where he observes: "The second "way in which proceedings may begin is by a police investigation. This "process (Sections 154-172, Criminal Procedure Code) is unknown in "England. It is not altogether unlike part of the French procedure, "but it is still more like what would exist in England if the course usually "taken in fact by the police were to be taken under a legal sanction, the "police being invested by law with special powers to take evidence for their "own information and guidance" (Vol. 3, page 332). Owing to this difference between the two systems official documents corresponding to "charge sheets" and "occurrence report" under our Code are unknown to the law in England, and consequently no question as to inspection of such document, has or could have arisen there.

The next argument appears to be that as in England a person accused of an offence falling under the description 'felony' is not entitled to a copy even of the indictment, it ought not to be held that an accused person in this country is entitled to copies of such documents as the charge sheet, &c. With reference to this argument, the first observation to be made is that the sole point for our determination being whether the documents in question are public documents within the meaning of Section 74 of the Evidence Act, one is unable to see any connection between that question and the fact that in England persons accused of a particular class of offence are disentitled to a copy of the indictment. In the next place, supposing the doctrine of English law as to copies of indictment in cases of felony is somehow germane to the present discussion, it is clear even in England that doctrine is much disapproved of, if it has not already ceased to be law (*vide* Greave's Note (*o*) at page 463, Russell on Crimes, 6th edition). But granting that it is well recognized in English Criminal Procedure, can it be defended as a just and sound rule whilst admittedly a man accused of a misdemeanour is under the same law treated better?

(1) 20 C. 642. (2) 16 C. 610.

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The characteristics of reasonableness and of good sense, which alone would justify our adopting a rule of English common law, being wanting in the particular instance relied on, a reference to it would seem scarcely calculated to throw true light on the question at issue.

[200] Another argument was urged with reference to the law as to grant of copies of depositions in England. In arguing thus by analogy, the peculiar nature of the theory which prevailed in England (before salutary changes were introduced by 6 and 7 Will IV., cap. 114), as to a prisoner's position with reference to everything done in connection with the charge against him *prior to the trial*, must not be lost sight of. That theory was that, in enquiring into and committing a person charged with an offence, a Magistrate was acting *inquisitorially*, that his enquiries should be conducted in private and behind the back of the prisoner if that is considered necessary and that the prosecutor or his solicitor alone might have access to the depositions taken by the Magistrate, but not the party accused, who, strangely enough it was thought, should not before the actual trial be enabled to know what the evidence to be adduced against him was (*vide*) the procedure adopted by the Magistrate in *Thurttell's case* (1) and the observations of Justice J. A. Park in the same case). Referring to the working of a practice of this extraordinary description, Sir James Stephen justly observes: "I do not think any part of the old procedure "operated more harshly upon prisoners than the summary and secret way "in which Justices of the peace acting frequently the part of detective "offices took their examinations and committed them for trial." (*Ib.*, page 225.) No doubt all this is now happily changed. But that such was the law and procedure even in the early part of this century ought to make one hesitate to look for light to the English practice under the common law in a matter like this. If we turn to the English statute law on the point, it cannot be denied that, so far as it goes, it affords reasonable facilities to the accused. The substance of it is this: a person under trial is entitled, subject to payment of certain fees, to copies of depositions, provided he applies for the same *before the day appointed for the commencement of the Assize or Sessions* at which he is to be tried. If, however, he is not diligent in the matter and applies later, he can get them only if the Judge considers that the copies may be made and delivered without delay and inconvenience to such trial. Nor are persons under trial who have not taken the precaution of securing copies of depositions thereby precluded from ascertaining before their trial the nature of the evidence [201] recorded against them by the Magistrate, for they possess the right of *inspecting without fee or reward* all depositions or copies thereof which have been taken against them and returned into the Court before they are tried. (3 Russel on Crimes and Misdemeanours, 6th edition, pages 404 to 466, and especially note V at page 456.) What is there in these provisions to suggest anything against the granting of copies of the papers in question?

Turning now to the provisions of the Criminal Procedure Code relating to those papers, it is necessary in order to understand their real import and nature to see why such provisions came to be enacted. Prior to the passing of the first Criminal Procedure Code, *viz.*, that of 1861, the powers of the police were different from those now exercised by them. Complaints in cases of the more serious offences were usually laid before them. They were authorized to examine the complainant, to issue process

(1) 1 Step. H. Criml. Law., 227.

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of arrest, to summon witnesses, to examine the accused and to forward the case to the Magistrate or submit a report of the proceedings according as the evidence may, in their judgment, warrant the one or the other course. These large powers were grievously abused for purposes of extortion and oppression, and it was a question for the determination of Her Majesty's Commissioners appointed to consider the reform of the judicial establishments, procedure and laws in 1856, whether the powers should not be greatly abridged. The Commissioners, however, came to the conclusion that considering the extensive jurisdiction of the Magistrates in this country, the facilities which exist for the escape of parties concerned in serious crimes and the necessity for the immediate adoption in many cases of the most prompt and energetic measures, it was requisite to arm the police with some such powers as they then possessed. (See page 181 of the Selections from the Records of Government: Papers relating to the Reform of the Police of India, 1861.) The original draft of the Criminal Procedure Code, therefore, sought to give effect to the above conclusion. But when the matter came before the Legislative Council much difference of opinion prevailed among the members of the Council in respect of some of the provisions inserted to carry out the view of Her Majesty's Commissioners. On the one side, it was contended that to allow the police to record statements of parties and witnesses and to place them before the Magistrate would be productive of much mischief. On the other side, it was urged that in the interest, not [202] only of the prosecution, but also of the defence, it was necessary that such statements should be immediately recorded and laid before the Magistrate at once. (See Proceedings of the Legislative Council, Vol. V, pages 515 to 545 and 570 to 574.) The substance of the existing provisions of the law respecting the submission of reports by the police seems to have been devised to avoid the evils apprehended by one set of the members and to secure in a measure some of the advantages, to which the other members attached so much importance.

Now, first, the general report directed to be sent is the daily report called the diary. This the law prescribes should be forwarded to the officers of the department itself, in accordance with the principle insisted upon at the reorganization of the police which took place about the same time as the passing of the Criminal Procedure Code, *viz.*, that dual control should be avoided and policemen should be directly dependent on, and be responsible only to, their own officers (page 250 of the selections already cited.) And this diary, which must contain everything material heard or done by a policeman in the course of the day with reference to his work, was, for obvious reasons, declared not to be subject to inspection by the parties. Next, special reports bearing upon particular cases coming up for investigation were directed to be submitted to the Magistrate. One of the objects, which the legislature had in view in requiring the submission of these reports to the Magistrates, was manifestly to provide a record with reference to which the action of police officers engaged in making an investigation may be scrutinized during the later stages of the case. Now, who is more interested in exercising this scrutiny than the accused implicated in the particular case to which the investigation relates? It is impossible to believe that the legislature intended that persons, so deeply interested in bringing to light any misconduct in connection with the investigation, should not have access to the records in question. If such were really the intention, why, whilst expressly laying down that the general report or diary cannot be called for by the parties, the legislature

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singularly enough refrained from declaring that these special reports also are confidential? Why did it not in terms extend the protection accorded to the diaries to the other reports prescribed? It is scarcely necessary to add that to withhold from the accused access to the reports in question would certainly be to deprive those [203] persons of one reliable means of ascertaining the development of the case during the investigation and to disable them from exposing, at the preliminary enquiry to trial, the attempts, if any, made by the police or other persons connected with the case, to get up false evidence, or other circumstances appearing in the reports and revealing flaws in the case for the prosecution.

As to Section 125 of the Evidence Act, that only provides against a police officer being *compelled* as a witness to say whence he got any information as to an offence. The section has clearly no reference to the present case.

Lastly, that the documents in question fall strictly within the language of Section 74 of the Evidence Act seems to my mind to admit of no doubt. First, as to the charge sheet, is it not a 'record' of at least *some* of the investigating officer's acts? Again, suppose it is not, is it not unquestionably *itself* a document forming *an* '*act*' *of his*, he being enjoined to act in a particular way, that is, submit such a report. The same remark applies to the report under Section 157. Nor is it right to suppose there is no other "occurrence report" sent by the police to a Magistrate in the course of an investigation. For, according to the rules of the department, a policeman making a search has to send one in respect of it to the Magistrate (Orders of the Madras: Police Order 140 (*h*), page 80), and there is the inquest report prescribed by Section 174 of the Code. Copies of these are not unimportant to accused persons, and it cannot be doubted that these reports are records of a public servant's acts within the meaning of Section 74.

For all the above reasons, I would answer the question submitted in the affirmative.

BENSON, J.—The question for our decision is, as I understand it, whether a person who is named as accused of an offence in a charge sheet forwarded by the police to a Magistrate is entitled before his trial to inspect and obtain copies of certain reports made by the police in connection with the case, *viz.*:—(1) the occurrence report made under Section 157, Criminal Procedure Code; (2) the report made under Section 168, Criminal Procedure Code, by a subordinate police officer to the station-house officer; and (3) the charge sheet drawn up under Section 173, Criminal Procedure Code.

It was, I understand, conceded that a copy of the station-house officer's report made under Section 167, Criminal Procedure [204] Code, could not be demanded, inasmuch as it is an extract from the police diary which is specially protected by Section 172, Criminal Procedure Code.

I am of opinion that the reference must be answered in the negative.

It is admitted that the right is nowhere given by any express legislative enactment; but it is argued that the reports in question are public-documents within the meaning of Section 74 of the Indian Evidence Act; that every person interested in the subject matter of a public document has an inherent right to inspect it, and that, under Section 76 of the Indian Evidence Act, every person entitled to inspect a public document is also entitled to obtain a copy of it. It will be seen that the whole question depends on whether the documents in question are public documents

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within the meaning of Section 74 of the Indian Evidence Act. I do not think that they are. The only class of documents specified in that section within which they could fall is "documents forming the acts or "records of the acts of public executive officers." The police officers who send in these reports are, no doubt, public executive officers, but I do not think that these reports can, with any propriety, be regarded either as forming their acts or as the records of their acts. The diary of a police officer which is kept under Section 172, Criminal Procedure Code, is the record of his acts, in the popular sense of the word, in making an investigation under the Criminal Procedure Code. It sets forth his proceedings day by day in making the investigation and *inter alia* it must record "the time at which "information reached him, the time at which he began and closed his in-"vestigation, the place or places visited by him and a statement of the "circumstances ascertained through his investigation," but this diary is by Section 172 expressly protected from inspection by the accused and his agents. It may, I think, well be doubted whether the word 'acts' in Section 74 is used in its ordinary and popular sense, and not rather in the restricted and technical sense in which it is used in Section 78 of the Act, but in either case, I think that the reports in question are not, in any sense, records of the acts of the police officer. This will be clear if their contents, as prescribed by law, are considered. The occurrence report Section 157), is a report sent to the Magistrate stating that the officer of police suspects, on information or otherwise, that a cognizable offence has been **[205]** committed in his jurisdiction, and if the police officer considers it unnecessary to investigate the case, it must state the reasons for such conclusion. It is not a record of his acts, but a report of information given to him. The report under Section 168 is merely a report by a subordinate police officer to the station-house officer of the "result of his investigation" into an alleged or suspected cognizable case. It is not the record of any act of the investigating officer. The charge sheet is the report sent to the Magistrate under Section 173 when an investigation has been completed. It must contain "the names of the parties, the "nature of the information and the names of the persons who appear to "be acquainted with the circumstances of the case," and must state "whether the accused person has been forwarded in custody or has been "released" on bail. This report is not the record of the acts of the police officer. It no doubt reports one act of the police officer, *viz.*, whether he forwarded the accused in custody, or has released him on bail, but it is not the official record of that act. The record of the act is the proceedings in granting or refusing bail, not the report of those proceedings to the Magistrate. I conclude, then, that none of the reports in question are the acts or the records of the acts of the police officers within the meaning of Section 74 of the Indian Evidence Act. They are not, therefore, public documents, and the accused has no right to inspect them or to obtain copies of them.

So far I have referred to the reports as if they contained only the information which they are required by the code to contain. As a fact, however, they have been enlarged so as to contain much more than the code requires. For example, in both the occurrence report and the charge sheet there is a column in which is set forth the name of the person by whom the information was given. Section 125 of the Indian Evidence Act expressly provides that no Magistrate or police officer shall be obliged to state whence he received the information of any offence. In any view, therefore, an accused person could have no right to inspect or obtain a

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copy of that entry. So also in the occurrence report the names of persons suspected are entered, and in the charge sheet the houses searched and other particulars which may not concern the accused person at all are stated. It is obvious that he could have no right to obtain copies of such entries regarding third persons. If, however, the accused person was entitled to obtain a copy of the [206] reports so far as they concerned himself, I do not think that his right could be taken away by the insertion in them of particulars regarding third parties or matters not required by law to be mentioned in the reports. The Magistrate might, however, grant an extract of so much only as concerned the applicant and was not protected by law from disclosure.

It is argued that, if an order has been made on an occurrence report or charge sheet affecting an accused person, he is, *ipso facto*, entitled to a copy of the document under Section 548, Criminal Procedure Code. This will be so only if the Magistrate making the order is at the time 'a Criminal Court.' It may, I think, be doubted whether a Magistrate (even when he has jurisdiction to try the offence) can be regarded as a 'Court' before the trial commences. He is certainly not a 'Court' when enquiring into offences which he is not empowered to try, *e.g.*, into sessions cases (Section 19, illustration (*d*) and Section 20, Indian Penal Code). In this large and important class of cases, therefore, Section 548 has no application. This, however, is not the question before us, and I need not pursue it further.

I am not aware of any statute or practice which enables an accused person in England to obtain, before his trial, copies of reports made by the police in the course of their investigations. No doubt the relations of the police to the Magistracy in the two countries stand on a different footing, but it seems improbable that if the Indian Legislature intended to give an accused person access, before his trial, to the police reports connected with his case, this would not have been clearly laid down by law.

In my opinion the alleged right is nowhere expressly conferred by law, nor can it be deduced from Sections 74 and 76 of the Indian Evidence Act.

I would, therefore, answer the reference in the negative.

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## [207] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

SRI RAJA CHELIKANI VENKATARAMANAYAMMA GARU (*Plaintiff in O.S. No.* 8 *and Defendant in O.S. No.* 12 *of* 1893), *Appellant in both v.*

APPA RAU BAHADUR GARU AND ANOTHER (*Defendants in O. S. No.* 8 *of* 1893), *Respondent*, AND

APPA RAU BAHADUR GARU (*Plaintiff in O.S. No.* 12 *of* 1893), *Respondent.** [8th, 11th, 14th, 15th, 18th, 19th and 20th January and 25th February, 1897.]

*Hindu law—Obstructed inheritance—Inheritance passing to daughter's son—Survivorship—Presumption of joint property.*

The daughter's sons of a deceased Hindu take the property of their maternal grandfather as an inheritance liable to obstruction and consequently take it without rights of survivorship *inter se*:

Where property enjoyed in common by persons capable of forming a joint Hindu family was in its origin separate property, there is no presumption that such property has subsequently become joint property.

*Muttayan Chetti* v. *Sivagiri Zamindar* (1); *Sivaganga Zamindar* v. *Lakshmana* (2) doubted.

[Affirmed, 25 M. 678 (P.C.)=4 Bom. L.R. 657=7 C.W N. 1=29 I.A. 156=12 M.L.J. 299=8 Sar. P.C.J. 286; R., 27 M. 300 (305)=13 M.L.J. 398 (403).]

APPEALS against the decrees of G. T. Mackenzie, District Judge of Godavari, in original suits Nos. 8 and 12 of 1893.

The facts necessary for the purposes of this report appear from the judgment of the High Court.

*Bhashyam Ayyangar, Pattabhirama Ayyar, Venkatarama Sarma, Seshachariar, Aiya* and *Subramania Ayyar*, for appellant in No. 164.

Mr. *Wedderburn, Ramachandra Rau Saheb, Subba Rau, Sundara Ayyar, Seshagiri Rau* and *Kuppusami Ayyar*, for respondents.

The Advocate General (Hon'ble Mr. *Spring Branson*), *Venkatarama Sarma* and *Aiya* for appellant in No. 165.

Mr. *Wedderburn, Ramachandra Rau Saheb, Subba Rau, Sundara Ayyar* and *Seshagiri Rau*, for respondent.

## JUDGMENT.

[208] The permanently-settled estates of Jaggampeta, Dontalooru and Rayavaram, the most important of the properties in litigation, belonged originally to Venkata Rao who died in July 1869. He left surviving him his widow, Venkayamma, his daughter, Chelikani Venkataramanayamma, and the latter's eldest son Niladri. Venkayamma, claiming to be the heir, took possession of the whole of his estate, moveable and immoveable, and held the same till her demise in July 1875. Then Venkataramanayamma succeeded to the property and died in July 1884, leaving behind her her husband Sami Rao, Niladri, already referred to, and her second son, Appa Rao, as well as three daughters; the last four having been born subsequent to the death of Venkata Rao. At the time of their mother's death, Appa Rao was aged 13 years and Niladri was aged 19 years. He

* Appeals Nos. 164 and 165 of 1895.

(1) 3 M. 370. (2) 9 M. 188.

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was, therefore, no longer a minor. He was, however, still treated as a minor, and Sami Rao, who had been managing the property ever since the death of Venkata Rao, continued to do so on behalf of both his sons. How long his management lasted does not clearly appear. The evidence, however, shows that sometime before 1889 Niladri had assumed the management, and had been carrying it on, on account of himself as well as of Appa Rao. But from 1889, when Appa Rao attained majority, both the brothers jointly looked after the property and continued to do so until September 1892, when Niladri died without male issue, leaving a widow Venkataramanayamma, and two daughters. The widow alleges that Niladri on his death-bed executed a will (Exhibit K), but this is now denied by Appa Rao. Sami Rao died on 23th November 1892. Until the death of Sami Rao, the widow and Appa Rao were on amicable terms, and the former's claim to a moiety of the whole property was admitted by the latter and both remained in joint possession of the estate. But in consequence of disputes having arisen, she was ousted from possession of the property soon after Sami Rao's death. Thereupon the two suits, from which these appeals are brought, were instituted.

In one of these, original suit No. 12 of 1893 (appeal suit No. 165 of 1895), Appa Rao sued to set aside the alleged will (Exhibit K) of his brother, Niladri, and in the other, original suit No. 8 of 1893 (appeal Suit No. 164 of 1895), the widow sued for possession of the whole of Niladri's property. The District Judge decided against the widow in both suits, and [209] against both decrees she now appeals, Appa Rao being the first respondent. In original suit No. 8 of 1893 the appellant (Venkataramanayamma), based her case upon the will of Venkata Rao (Exhibit A), dated the 6th September 1866, which was, soon after its execution, deposited under a sealed cover in the District Registrar's office, and which has ever since remained there, and upon Exhibit K the alleged will of Niladri, dated the 2nd September 1892. In her plaint she also prayed, in the alternative, that if her claim to the whole estate should be held to be unsustainable, such share as she might be found entitled to, should be decreed to her.

The principal defence of the first respondent as to Exhibit A was that it was revoked; as to Exhibit K, that it was not genuine or valid. It will be convenient to defer the discussion of matters connected with Exhibit K until appeal suit No. 165 (original suit No. 12 of 1893) is taken up for consideration.

The first question, therefore, for determination is whether Exhibit A was revoked. The Hindu Wills' Act does not apply to the case, and no special mode of revocation being prescribed, revocation, like any other question of fact, may be proved by apt evidence, though no doubt mere oral evidence in a matter like this should be received with great caution. What amounts to revocation in common law was clearly pointed out in *Doe dem. Reed* against *Harris*(1) cited for the first respondent. There Lord Denman, C. J., in the course of his judgment observed, "some doubt "has been entertained whether any declaration could be sufficient without "the word 'revoke' but, upon full consideration, we think it impossible so "to limit the testator's power of revocation, and that any equivalent word "or words and expressions would be sufficient for that purpose.

"But, further, we are now required to consider whether, without any "language at all, a testator may revoke a will by the conduct he exhibits.

(1) 8 A. & E. 11.

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"And this appears to be tantamount to an enquiry whether conduct *can* "give a positive declaration of intent. If it can, there can be no more "*necessity* for words than for the use of a particular expression. Now, "nothing is easier than to imagine such gestures and proceedings, con-"nected with the will, as must fully convince every rational mind "that [210] the testator intended to revoke his will, and thought he had "done so by the means he took for that purpose. But if he who has "power to revoke by declaring a present resolution then to do so does in "fact make that resolution manifest, it seems clear that the act of revoca-"tion is complete in every essential part."

Such being the rule on the point, does the evidence here establish the first respondent's contention that, though Exhibit A has all along remained in the Registrar's office, yet it was in reality revoked? The evidence in support of it consists chiefly of the testimony of the seventh and the eighth witnesses called for the first respondent and certain circumstances connected with the enjoyment and devolution of the bulk of the property referred to in the will. Exhibit XXXIII, copy of the vakalat spoken to by the said seventh witness, the reception of which in evidence was rightly objected to on behalf of the appellant, both in the Lower Court and here, on the ground that the original was not accounted for as required by law, must be excluded from consideration.

Now as to the evidence of the two witness relied on; Gourayya, the seventh witness, is a pleader whom Venkata Rao had employed to transact his legal business from March 1866, that is, for some six months previously to the execution of the will. The material portion of his evidence may be given in his own words:—"I heard that Venkata Rao "executed a will. He spoke to me about a will. He told me he had "cancelled the will and the pattas, and he said that he would empower me "to get back the will from the Registrar's office. He said that he had taken "back the pattas. He said that he would give me a vakalat. He got that "vakalat registered. I did not get back the will from the Registrar's office. "I was not able at once to go to the Registrar's office as I fell ill. The "vakalat was executed at Jaggampeta and I took it to Peddapur. Nila-"chalam asked me to return the vakalat as he heard that I was not well. "He said that they would send somebody else. Nilachalam was the son "of the kept woman of the Rajah and was looking after the estate under "Venkata Rao. He was a confidential servant of Venkata Rao. I "returned the vakalat to him. Nilachalam is dead." Virayya, the eight witness and maternal uncle of Nilachalam referred to by the seventh witness, stated that he was a servant under Venkata Rao and that he (the witness) was present when Nilachalam informed Venkata Rao that he had brought the will, that thereupon Venkata [211] Rao said "Tear it," and that Nilachalam tore the paper which he led Venkata Rao to believe was the will. Turning now to the weight due to the testimony of these witnesses, Gourayya appears to be unconnected with either of the parties in the litigation. He is apparently independent and his cross-examination suggests no grounds for impugning his evidence, which is confirmed strongly by the fact that a vakalat to get back the will from the Registrar's office was executed by Venkata Rao on the 21st November 1867, presented for the registration on the 24th idem and subsequently duly registered (Exhibits XL and XL*a*). The conversation, which the witness says took place between him and Venkata Rao, is therefore likely to have taken place. But the eighth witness's story is in itself so extraordinary that it cannot be depended upon in the absence of corroboration, and

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this is altogether wanting. Two matters are, indeed, relied on as corroboration. The first is that some of the papers connected with the cancellation of grants of land referred to in the will, one to Venkata Rao's sister and another to his illegitimate sons, made about the time of the execution of the will, had been fraudulently abstracted from the records of the Collector sometime before 1871 (Exhibit XXXIX). The other is the fact that Venkayamma in that year complained (Exhibit XXXVIII) that such clandestine removal of the papers had taken place at the instigation of Nilachalam and Venkata Rao's sister. We do not, however, think that these matters can be accepted as affording any material corroboration of the story. That story, if true, implies that Nilachalam perpetrated a gross fraud on his father with whom he was on confidential terms. What motive Nilachalam had for so deceiving Venkata Rao is not shown. The suggestion is that he acted in the way alleged in the hope of being able to rely on the will after the death of Venkata Rao in support of some claim he (Nilachalam) intended to make to the property, the grant whereof was recited in the will but the right to which he had relinquished as was evidenced by the missing papers. The suggestion is a mere surmise and is too far fetched to be safely acted upon. On the other hand, it is argued on behalf of the appellant that it was to the interest of Nilachalam that the will should have been destroyed; since in that event, it might have been open to him as an illegitimate son to claim by inheritance a share of Venkata Rao's estate along with the widow or with the daughter or with the latter's son. The argument has [212] little force since it has not been shown that the connection between Nilachalam's mother and Venkata Rao had been of such a character as to give Nilachalam the status of an illegitimate son entitled to inherit under the Hindu Law. Nor has it been shown that Nilachalam thought he had a right to set up such a claim. The evidence of the eighth witness being, in our opinion, incredible and uncorroborated, must be rejected, and the fact that Exhibit A was not taken back from the Registrar's office and destroyed, must be treated as unexplained.

That fact, however, is not conclusive against the alleged revocation, and we must now see how far evidence connected with the enjoyment and devolution of the property proves the revocation. In the will reference is made to grants of property already made to certain relations and dependents of Venkata Rao; the rest of his estate being left to his wife Venkayamma, and after her to his daughter Venkataramanayamma and to his grandson Niladri. Of the grants *inter vivos*, the most important are those made respectively to the testator's sister, to his illegitimate sons including Nilachalam, and to the testator's daughter Venkataramanayamma. The sister got a village with a nett rental of about Rs. 4,000, the sons another with a rental of about Rs. 2,000 and the daughter two villages with a rental of about Rs 6,000 per annum (Exhibits XXXV, XXXIV and XXXVI). It appears from the statements in the will and in Venkata Rao's grant (Exhibit XXXV) to his sister that what really prompted him to make the grants and to execute the will was his serious illness in 1866. However by October 1867, Venkata Rao had fully recovered and he then changed his mind about the grants and persuaded the grantees to relinquish their rights under the grants (Exhibits XXXIV*a* and XXXVIII). This was in October 1867. The very next month Venkata Rao employed Gourayya to withdraw the will, executed a vakalat to him for the purpose and even took the precaution of registering the vakalat. Considering that the three grants and the will came into existence almost

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simultaneously, *viz.*, between the 6th and 14th September, and that the cancellation of the former was shortly afterwards followed by steps to take back the will from the Registrar's office, the inference, it is argued, is that Venkata Rao wished to get the will back because it also had been cancelled. Now, though the facts on which the above argument rests are true yet the inference drawn therefrom [213] is far from being conclusive. Nevertheless it would seem to be entitled to some weight when taken with the light thrown upon the matter by the conduct of Venkayamma, Venkatarmanayamma, and Niladri, and by the views which they took of the titles under which they held the zemindari during the twenty-three years, which elapsed between the death of Venkata Rao and that of Niladri.

What then were the views taken by them? Three days after her husband's death Venkayamma wrote to the Collector of Godavari a letter which runs thus: "My husband Sri Raja Rao Venkata Rao Bahadur "Garu having been unwell, owing to the illness he had, died on the 22nd "of this month; I have a daughter called Chelikani Venkataramana-"yamma, a grandson (by-daughter) called Chelikani Venkatasurya Nila-"dri Rao of the age of four years and a grand-daughter (by daughter) "called Venkayamma aged one year. *I am the heir to the whole of my "husband's property according to law.* I shall from this day forward "manage the affairs. I therefore request you will be good enough to "cause Jaggampeta, Dontalooru and Rayavaram mittas which are stand-"ing in my husband's name to be entered in my name and grant me a "dhimat (a written authority for collecting revenue) . . . . ." Under the orders of the Board of Revenue, the estates were registered in the name of Venkayamma who was described in column 9 of the register Exhibit IV bearing the heading "mode of transfer by sale. gift or otherwise," as having taken "by inheritance." After having held the property for about six years, Venkayamma became ill and wrote to the Sub-Collector of Godavari on the 14th July 1875. "I am not therefore "confident that I would live and consequently write to you in regard to "the whole of my property. I have got a daughter by name Sri Raja "Chelikani Venkataramanayamma. The said Venkataramanavamma is "the chief heir to my zemindari consisting of Jaggampeta, Dontalooru "and Rayavaram estates and to all other moveable and immoveable proper-"ties. I therefore request that the right to the zemindari consisting of "the said estates may be registered in her name . . . . . ." On the 17th idem Venkataramanayamma herself communicated to the same officer her mother's death and after observing "I am the reversionary "heir to all the estates forming the moveable and immoveable property "of my mother" concluded with a prayer for the registry being transferred to her name as heir (Exhibit V). [214] Lastly on the 27th June 1884 Venkataramanayamma wrote to the Collector of the District informing him that she had fallen ill, that she did not expect to recover from that illness and that she had given to her two daughters some "property and observed after my death my *two sons are the chief heirs* to "my estates and to the whole of my moveable and immoveable property" (Exhibit I). This view was endorsed, in equally distinct terms, by Niladri himself in his letter to the Collector, dated the 8th July 1884, intimating his mother's death and asking the estates to be registered in the names of *himself and the first respondent* which was accordingly done. Not only was no reliance placed on the will on these three important occasions, but it is not shown that it was relied on or even referred to

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on any other occasion until, at all events, a month before Niladri's death in 1892. Such conduct on the part of the three successive holders of the estate tells strongly against the case of the appellant, who has consequently attempted to explain it away by suggesting that Venkayamma, Venkataramanayamma and Niladri were all ignorant of the will and of its provisions. This suggestion is hardly consistent with the plaint which, while it asserts that Nildari was unaware of the arrangement made by Venkata Rao, refrains from saying that such ignorance was shared by Venkayamma and Venkataramanayamma; nor is there any evidence whatever on behalf of the appellant to prove the alleged ignorance. The probabilities are all the other way. It is difficult to see why Venkata Rao should have wished to keep the will a secret from his wife and his daughter who were living on affectionate terms with him at the time he made the will in their favour. On the contrary, if, as was said in one part of the argument on behalf of the appellant, one of Venkata Rao's objects in making the will was to prevent his illegitimate sons laying any claim by inheritance to a share of the zemindaries along with his widow, his daughter, and his grandson by the daughter, surely he would have taken care to let these latter know what he had done to secure their rights against the possible claims of the illegitimate sons. Again, there was no secrecy whatever attending the execution of the will. It was written by Jagga Raja, one of Venkata Rao's gumstahs, and was attested by the Karnam and the Village Munsif of the place. Moreover, about twelve months after the will was deposited in the Registrar's office, the vakalat for its withdrawal was publicly [215] executed and registered, Vakil Gourayya having, as stated by him, paid a visit to the zemindar in connection with that vakalat and the then Sub-Magistrate, in his capacity as a registration officer, having attended at the zemindar's residence to accept the presentation of the vakalat for registration Exhibit XL*a*). That, notwithstanding all these circumstances, Venkayamma, Venkataramanayamma as well as the latter's husband Sami Rao who was residing with them all the time as a member of the family, somehow did not come to hear of the will in Venkata Rao's life time is hard to believe. It is harder still to suppose that even after Venkata Rao's death, no information reached his successors at any time before August 1892, and the more so as Jagga Raja, the writer of the will, was alive all the time. Then it is also suggested that the ladies probably thought the will amounted to nothing more than a mere statement of the rights they possessed under the Hindu law and so did not think it worth while or necessary to refer to, and rely upon, the will. This conjecture also—for it is nothing more—is a very unlikely one, for even if the ladies had supposed that the will amounted to nothing more than a declaration of their rights under the Hindu law, they would still almost certainly have alluded to it at all events as confirmatory evidence of their claim under the Hindu law. Another suggestion is that Venkataramanayamma did not wish Niladri alone to take the property to the exclusion of the first respondent and the omission to refer to the will was due to this cause. This ingenious argument, however, cannot account for Venkayamma's conduct in 1869, as the first respondent was not born till two or three years later. It is scarcely necessary to add that so far as Niladri was concerned, his admission that he and the first respondent were *co-heirs* cannot be explained except upon the hypothesis that he was absolutely unaware of the provision of the will in his own favour. But in support of such hypothesis nothing is to be found in the evidence, whereas it is clear, upon the

testimony of plaintiff's own fourth witness, Jalandanki Venkayya, that Niladri was aware of the will and of its provisions. In these circumstances the conclusion that the will was never after November 1867 treated as a subsisting testamentary paper seems irresistible. And how strong was the conviction in the minds of the members of the family that the instrument was not a subsisting one may be gathered from the suggestive ambiguity to which the persons, who drew up the plaint[216]in this case, found it necessary to have recourse in alleging Niladri's exclusive right to the property. For, though several authenticated copies of the will had been obtained from the Registrar's office by the appellant's agent a month or two before the plaint was filed, yet Exhibit A is not referred to in the plaint, nor is it even alleged that "the arrangements" under which Niladri got the estate were made by any will of Venkata Rao. When this is contrasted with the explicit statement in the plaint as to Exhibit K referred to therein by date and as the "will" of the Niladri, it is pretty plain that the appellant's advisers were then unwilling to tie her down to the case that the arrangement, which was set up as having constituted Niladri the sole heir, was the one made under the will in question. This remarkable unwillingness on their part even at that late hour, considering that there was no doubt either as to the genuineness or the validity of the instrument, can be attributed only to the grave distrust felt by those advisers as to the possibility of treating Exhibit A as a disposition still in force.

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Such are the chief considerations which favour the first respondent's contention. Against it, no doubt there is the fact that the document was not actually taken back from the Registrar's office. Why Venkata Rao failed to get it back (as we have seen he intended to do) has not been explained, but this fact ought not to be pressed too strongly against the first respondent, since owing to the lapse of time almost all the persons who would have been in a position to throw light on the matter were dead at the time of trial. In these circumstances Gourayya's evidence, coupled with the course of conduct referred to above, is entitled to great weight and the finding of the District Judge that the will was revoked must be held to be correct. On this finding it is unnecessary to go into the questions which would arise if the will were still in force.

Now Venkata Rao having died intestate it follows that, on Venkataramanayamma's death, the inheritance passed to Niladri and to the first respondent as his daughter's sons, and the question then arises whether at the time they succeeded to the estate, they took the property with the right of survivorship under the law, or separately without any such right.

Having regard to the well-known Mitakshara doctrine of right by birth giving rise to that form of joint property designated as[217] "unobstructed heritage," as opposed to "obstructed heritage," it is difficult to see how the present question can be answered except in the negative. According to that doctrine only the man's son, son's son, and son's son's son acquire a right by birth and thereby a community of interest in the property of the father, grandfather or great grandfather. Such community of interest, however, does not entitle any of the co-parceners to predicate, before a partition is effected, what the extent of his share in the joint property is, since the share is liable to diminution by the successive births of other co-owners. But that very circumstance renders it just and right that when any member of such a co-parcenary dies, his undefined interest should not vest in his own heirs, but should lapse to his survivors and go to augment their rights in the undivided family

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estate. Hence the rule of survivorship recognised under the Mitakshara system. When however, under the same law, property passes by pure inheritance or obstructed heritage, it vests only in him who is the heir in existence at the time the inheritance opens (*Narasimha* v. *Veerabhadra*(1) and if there happen to be two or more co-heirs the share of each is not liable to variation by the subsequent birth of a person of the same class, but is fixed and definite. Consequently in such a case the reason for the rule of suvivorship does not exist and the rule itself is totally inapplicable. This conclusion drawn from principle is well supported by authority also. In *Gopalasami* v. *Chinnasami*(2) Turner, C.J., and Brandt, J., expressed a strong inclination against the applicability of the doctrine of survivorship to a case like the present. And in *Jesoda Koer* v. *Sheo Pershad Singh* (3), Petheram C.J. and Banerjee, J., after a critical examination of the chief passages relating to the question in the Mitakshara and other works, and after referring to the leading decisions that throw light on the subject, held that the principle of survivorship under the Mitakshara law is limited (1) to property which is taken as unobstructed heritage (including property thereby acquired) and (2) to the joint property of re-united co-parceners; but does not extend to property which is inherited by two brothers as heirs of their mother's father and which does not fall under either of those descriptions. This considered decision was referred to with [218] approval in the analogous case of *Saminadha Pillai* v. *Thangathanni* (4) where Shephard and Best, JJ., held that when a group of heirs took the estate of a deceased divided member after his mother, the rule of survivorship did not apply. The *ratio decidendi* of this decision and of the Calcutta ruling which in effect it followed is identical, *viz.*, that survivorship does not exist in any case in which property passes as *obstructed heritage.* The heritage in the present case, being that of daughter's sons, is an obstructed heritage, and is, therefore, on the above principle, not subject to the incident of survivorship.

On the part of the first respondent, however, certain passages of the Sarasvati Vilasa, particularly paragraphs 632, 646, and 654, (Foulkes's translation, pages 125, 128, 129), were relied on. The doctrine propounded in those passages is stated, in the very commencement of the disquisition, to be the teaching of Lakshmidhara. Dr. Jolly considers that, as it is not clear whether the author of the Sarasvati Vilasa meant to make the teaching his own, it does not possess more than a historical interest. (Hindu Law, page 202.) The doctrine, in question, in the words of the same learned writer, is that "property devolving on a daughter who has a "son, assumes the nature of unobstructed property and is passed on by "the daughter's son to his own son, in case he was alive at the time of "the devolution of the estate." (*Ib.*) According to this view, a daughter's son, in existence at his mother's succession, takes a *vested* right the moment the property devolves on his mother. But it is well settled that the right of such an heir, to inherit his grand-father's estate, is *contingent on his surviving his mother and her sisters, if any.* Moreover the assertion that, in the case supposed, the inheritance assumes the nature of unobstructed heritage, does not appear to be supported by any of the other treatises of the Mitakshara school, since none of them recognizes any exception to the fundamental theory that from the widow downwards the property devolves as obstructed heritage. This is necessarily implied in most of those treatises. In one of them at least, *viz.*, the Vyavahara Mayukha

(1) 17 M. 287. (2) 7 M. 458. (3) 17 C. 33. (4) 19 M. 70.

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the author begins the discussion regarding the descent of a sonless separated man's property with words which have been translated, "order of succession to obstructed heritage" (Mandlik, page 76)—words which, in the absence of subsequent [219] qualification, must be taken to include under "obstructed heritage" even the case spoken of by Lakshmidhara. It is clear, therefore, that Lakshmidhara's teaching cannot, as pointed out by Mr. Mayne, be now accepted as law. (Hindu Law, fifth edition, note *g* to Section 519.)

*Muttayyan Chetti* v. *Sivagiri Zemindar*(1) and *Sivaganga Zemindar* v. *Lakshmana*(2) were also referred to on behalf of the first respondent. But they clearly do not touch the present question. There, it was held that as between a man and his son the former's power of disposition over property, inherited by him from his maternal grandfather, is restricted as it is in the case of unobstructed property belonging to the man and his son. Whether this conclusion can be maintained after the decision of the Judicial Committee in *Sartaj Kuari* v. *Deoraj Kuari* (3) is open to doubt. Now the *ratio decidendi* of that case, in the concise words of Shephard and Davies, JJ., in the recent Pittapur case (4), is this—"Where the right to a partition is wanting there is no restraint on the power of alienation." See also *Sivasubramania Nayakar* v. *Krishnammal* (5). Such being the rule laid down by the Privy Council and it being unquestionable, as is admitted by the learned Judges, who decided the cases in *Muttayyan Chetti* v. *Sivagiri Zemindar* (1) and *Sivaganga Zemindar* v. *Lakshmana* (2) that a partition of property inherited from a maternal grandfather cannot be claimed by a son of the man who thus inherited it, it would seem to follow that the view, taken in those two cases to the effect that, though a son cannot ask for a share of such property, he can nevertheless impeach his father's alienation thereof, is no longer sustainable. But supposing it to be otherwise, those cases are quite distinguishable from this. In them the question related to a man's power to restrain alienation of immoveable property coming to his father as obstructed heritage. And in support of the view adopted there, Mitakshara, Chapter I, Section 27, may, perhaps, still be relied upon as an authoritative text, upon the exact weight due to which, no direct pronouncement has yet been made by their Lordships of the Judicial Committee. In the present case, however, the question is not between a father and his [220] son seeking to restrain his father's alienation, but between the representative of a sonless deceased co-owner and the surviving co-owner claiming by survivorship the share of that deceased co-owner in property in which the co-owners took *no right by birth*, and therefore neither the survivor nor the representative of the deceased ought to be affected by any of the peculiar consequences flowing from such right.

The finding upon this question of law must, therefore, be against the first respondent.

The next question to be considered is whether, though the brothers took originally as tenants in common, the first respondent is entitled to Niladri's moiety by survivorship in consequence of the mode in which the property was dealt with by them between 1884 and 1892. It was urged on behalf of the first respondent that, in cases like the present, unless the contrary is shown, it should, as a matter of law, be taken that

(1) 3 M. 370. (2) 9 M. 188. (3) 10 A. 272.
(4) (*The Court of Wards* v. *Venkata Surya Mahipati Ramakrishna Rao*), 20 M. 167.
(5) 18 M. 287 (289).

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the rule of survivorship prevails. We do not find any ground for this contention. No doubt, when two persons capable of forming a joint family under the Mitakshara, hold some property in common and the requisite legal foundation has been laid for the conclusion that that property is undivided family property, then the presumption of law in respect of all other property in the hands of any of the members of the family is that the same is joint, and if a member of such a coparcenary alleges that any particular property is, in fact, not part of the joint estate but his own separate property, he has to rebut the presumption and prove his allegation. But if that is done, and if an interest, in the particular property, is claimed by some other member on the ground that though originally separate it subsequently became joint property, the *onus* of establishing the claim is undoubtedly on the member who advances it.

Now, here inasmuch as according to the finding already arrived at, Venkata Rao's estate, with its accretions, devolved on Niladri and the first respondent as mere tenants in common, it is for the first respondent to show that, subsequent to such devolution, Niladri's share ceased to be his separate property and that the shares of the two were merged into a common whole with the incident of survivorship attaching to it. In other words the first respondent has to make out that he and Niladri had, by mutual consent, express or implied, altered radically the character of their title to the estate by substituting for the several ownership [221] of each in his respective moiety (with absolute power to alienate and with right to transmit by inheritance to his own heir), a joint ownership, with a restricted power of transfer and a right on the part of the survivor to take the whole in the event of the other dying sonless. Does the evidence prove that any arrangement of the kind took place? If the first respondent were able to satisfy the Court, that, as alleged in his written statement, he and Niladri held other property which was joint and that they incorporated therewith the property now in dispute, the contention under consideration must succeed. But he has clearly failed to show any such incorporation. It is conceded that Niladri and the first respondent derived no property at all from any ancestor in their paternal line save Sami Rao, their father. It is conceded also that when Sami Rao left his father's house many years ago and went to reside with Venkata Rao, Sami Rao possessed no ancestral or other funds, and it is admitted that his subsequent acquisitions consisted only of certain jewels (said to be worth Rs. 10,000 or 15,000) which were presented to him by his father-in-law, his mother-in-law and his wife. But it is stated by the first respondent himself and two other witnesses, on his behalf, one his servant and the other his relation, that a couple of months after Venkataramanayamma's death Sami Rao, having himself fallen ill, handed over to Niladri the key of the box containing the former's jewels with the object of transferring the ownership in them to both the sons. This entirely uncorroborated story that a man, who had then two sons and a daughter living—the sons being in affluent circumstances whilst the daughter was not well provided for—took it into his head to give away to his sons alone the whole of the comparatively little property he had, in order that that little might form a common stock with which the extensive separate property in question was to become incorporated, is one which, on the face of it, bears evident marks of invention for the purposes of this litigation, and is, therefore, altogether unworthy of serious consideration. Moreover, even if Sami Rao had really parted with the jewels, as alleged, how would that advance the first respondent's case? For nothing was done by the

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brothers with reference to the jewels, and it is difficult to understand how the mere fact of joint possession thereof by them lends the slightest support to the theory of incorporation. Nor does the first respondent's contention stand on a better footing with reference to the other circumstances relied on in proof [222] of the alleged incorporation, *viz.*, (i) joint residence and messing together, (ii) investment of the annual surplus income in trade for the benefit of both the brothers, or in property acquired in their joint names, and (iii) Niladri's expenses being in excess of those of the first respondent. In drawing inferences from circumstances like the above, it must be borne in mind that facts not distinctly inconsistent with the presumption of the continuance of the original tenancy in common cannot afford any support to the first respondent's contention. (Compare *Robinson* v. *Preston* (1).) To support it the circumstances relied on should be unequivocal, and should point unmistakably to an intention to effect a mutual transfer of the kind suggested. But those referred to above do not point to any such conclusion. The only fair inference to be drawn from them, taking them all together, is that the brothers did not feel any necessity for dividing either the corpus or the income, and found it convenient for the time being to live together and manage their property in common. To hold that because the brothers merely refrained from dividing what in law was separate—their conduct here amounted to nothing more—therefore they intended to effect a complete change in their relative rights would be unreasonable and unwarranted. Let us now look at each circumstance separately. So far as residence and food go, matters continued exactly as they had been prior to 1884, when the brothers owned no property derived from their father or mother. As to joint investment the interest possessed by the brothers in the business carried on with the aid of their surplus incomes, as well as in property acquired thereby, is *prima facie* of the same character as that possessed by them in the incomes so invested (see *Robinson* v. *Preston* (1) ), and there is absolutely nothing to show that in the present case their interest was otherwise. No doubt the brothers did occasionally borrow money on their joint promissory notes. But surely tenants in common may do so for the purposes of their common estate. Why, then, should it be assumed that such acts were done by the brothers as members of a joint Hindu family, the very point to be proved, and not as tenants in common as they were shown to have been at starting? Again, the argument founded on inequality in the expenses of the brothers is entitled to little or no weight, since it entirely dis- [223] regards the ordinary latitude likely to be allowed between brothers out of natural affection and good feeling—a consideration which ought not to be lost sight of in dealing with an argument like that in question (*Lala Muddun Gopal Lal* v. *Mussumat Khikhinda Koer* (2)). Lastly, as to the documents referred to in the argument with reference to this part of the case, it is to be observed that they really only bear upon one or other of the circumstances just dealt with, and therefore require no further notice. For these reasons, differing from the District Judge, we must hold that the second ground, taken for the first respondent's contention in regard to survivorship, also fails, and, consequently, Niladri's moiety passed to the appellant as his widow and heir.

There remains a minor point in appeal suit No. 164 raised by the appellant, *viz.*, that certain inam lands included in the plaint property,

(1) 4 K. & J. 505.

(2) 18 I.A. 9.

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but found by the District Judge to belong to the second respondent, were really purchased with money which belonged to Niladri and the first respondent, and were, therefore, properly included in the present suit.

The second respondent admits in his evidence that he did receive from the brothers in November 1891 when, he was in their employ as a clerk, Rs. 4,000, which sum was entered in their accounts as sent to him for the purchase of inam lands. He also admits that he bought at a Court-sale held in that very month the lands in dispute for less than Rs. 2,000. He moreover concedes that he has not repaid any portion of the Rs. 4,000 sent to him as recited in the accounts. Nor is it his case that the sum was a gift or a loan to him. In these circumstances his interested evidence that the lands were acquired with his own funds cannot be depended upon and there is no other evidence to prove the plea. The property must, therefore, be held to have been acquired by him with the money and for the benefit of his then employers—Niladri and the first respondent.

We must now determine whether the alleged will of Niladri, Exhibit K, is genuine or not. This is the only question in appeal suit No. 165. The District Judge was of opinion that it is not, and with that conclusion we concur. [Their Lordships then discussed the evidence relating to Exhibit K and proceeded :]

* [On the part of the 1st respondent some evidence was given to show that several hours before the time when Exhibit K is said to have been executed, Niladri had become quite unconscious. But the witnesses were few, and mostly interested and it does not appear to be safe, to act upon their evidence. The question depends, therefore, upon the intrinsic evidence of the will itself, the probabilities of the case, and the credit to be attached to the testimony adduced on behalf of the appellant. The substance of that testimony is this. At about 3 P. M. on the 2nd September 1892, Niladri was taken ill of cholera. The attack was a sharp one. After the appearance of the disease the patient was confined to bed where he suffered from the evacuation and vomitting which accompany the disease. He gradually became worse and a considerable time before the alleged execution of the will the following symptoms had appeared. The whole of his body was cold and covered with clammy perspiration. He was suffering from thirst and spasms and cramps not only in the legs but in the hands also. His eyes were sunken and his voice had become feeble. There was suppression of urine also. At about 10 P.M. he expressed a wish to leave a will. Jaldanki Venkayya, the 4th witness, who was close by listened to what he said. Niladri's instructions were that his daughters should each get immoveable property yielding Rs. 2000 per annum, that the appellant should adopt a son and that the appellant and the son to be adopted should take half the estate. Venkanna Pantulu, the appellant's 11th witness, a Second Grade Pleader, who happened also to be present, thereupon dictated to Sabbarayudu, the appellant's 14th. witness, Exhibit K. This took about half an hour. The paper was then read out to Niladri who approved of it. took it in his hands, put it on his pillow and signed it, and out of the crowd of 30 or 40 people present at the time the nine persons whose signatures appear in the document attested it then and there and the document was immediately sent to

* *N B.*—Here commences that portion of the judgment which has been omitted in the I.L.R.—ED.

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the appellant who was in her own apartment. About 12 P.M., Niladri's condition became hopeless. His voice became indistinct, the spasms ceased and at 2 A.M. of the 3rd, the Hospital Assistant thought the man was dying, though he did not actually expire till twelve hours later.

Now all the attesting witnesses as well as one, Balakrishna Murti, said to be the family doctor, and Venkata Doss, appellant's brother, speak to the execution and the 1st respondent himself some time after Niladri's death treated the will as genuine. We are not however prepared to accept the evidence of the appellant's witnesses as true. The District Judge says of the attesting witnesses generally that their evidence left an unfavourable impression on his mind. Jaldanki Venkayya and Venkanna Pantulu, the Second Grade Pleader, are the two most important witnesses, but their credibility is impeached by the appellant herself who called them, the insinuation being that though they were compelled to adhere to the account which they had given before the Sub-Registrar as to the execution, they were nevertheless hostile to the appellant, and had been won over by the 1st respondent. A similar insinuation was made against Sarabayya, another attesting witness and a Karnam of the village. No great reliance can, therefore, be placed on the evidence of these witnesses. The remaining witnesses, excepting perhaps the Hospital Assistant, are men of no position. The whole of the oral evidence of the appellant's witnesses in support of the will is rendered suspicious by their consistent determination to deny the existence of any draft of the will. A draft however (Exhibit 25) was found. It is proved that it is in the hand of the writer of Exhibit K, and indeed, in this Court, it is admitted that it is in fact a draft. Now in this draft the land left for the support of the three daughters is said to produce an annual sum of Rs. 4,500 being at the rate of Rs. 1,500 for each daughter, whereas in the will itself the figure is Rs. 6,000 being at the rate Rs. 2,000 for each daughter, and the oral evidence is that Niladri never mentioned Rs. 1,500 at all but desired that the provision for each daughter should be Rs. 2,000. Jaladanki Venkayya who said he listened to the alleged instructions of Niladri, Venkanna Pantulu who got these instructions reduced to writing, and Subbarayudu who wrote Exhibit XXV and Exhibit K. all failed to furnish any satisfactory explanation for the discrepancy. The two former pretended that they did not remember anything about a draft, and Subbarayudu, who as the writer of Exhibit XXV could hardly make the same plea falsely stated that Exhibit XXV was not a draft at all but a copy subsequently prepared. These attempts to keep back the truth about a material matter show that the oral evidence is not trustworthy, but the chief difficulty in supposing that the account given by the witnesses is true arises from Niladri's physical condition at the time when he is said to have signed Exhibit K. Now, between the first appearance of the disease at about 3 P.M., and the time (10 P.M.) when the will is said to have been executed, more than seven hours had elapsed. From the first the patient was steadily sinking and long before the time of the alleged execution, "Niladri had become so enfeebled" as to be literally unable to move from his bed even for necessary purposes. Further, an hour before he is said to have given expression to his wishes about the will, when the Hospital Assistant arrived, most, if not all, of the symptoms, spoken to by Surgeon-Major Marsden, the expert witness, distinct indications of a total failure of vital powers were observed in Niladri.

The Hospital Assistant's evidence shows that he was suffering from cramps and twitching not only of the legs, but also of the hands, and the

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latter were cold and clammy. It is impossible to believe that a man in this condition writing prostrate in bed and with the paper placed on a pillow made what purports to be Niladri's signature in Exhibit K. The signature is a long, firm, bold and flowing signature. It bears a tolerable resemblance to Niladri's ordinary signature, but on close examination reveals some characteristic differences, the most prominent of which is noticed by the District Judge. It is also to be observed that though the will is attested, as the District Judge says "with a superabundance of caution by no less than nine witnesses" none of his relations signed it. His father, his brother, his wife's brother, and his sister's husband were either in the house or not far away at the time, yet not one of them has attested it, and the explanations offered for this omission are not, in our opinion, satisfactory.

We, therefore, agree with the District Judge in holding that the document is not genuine.

Such being our conclusion, it is perhaps unnecessary to speculate as to how and why the will was concocted; but the subject requires some notice in order to understand how it was that the 1st respondent came to act upon this spurious document for some time as if it were a true one.

Here we are left without any direct evidences, but the circumstances of the family and the probabilities of the case lead us to the conclusion that in all probability the will was concocted by Sami Rao, with the assistance of Venkanna Pantulu, the 2nd Grade Pleader, with a view to prevent litigation in the family and to secure the devolution of the property in the way that had apparently been contemplated by the family for many years, and the will was accepted by 1st respondent in the belief that it was genuine, until after Sami Rao's death, on the 28th November, the real facts began to be spoken of and came to the knowledge of the 1st respondent who speedily filed his suit on the 13th December 1892. The evidence shows that shortly before his death Niladri procured a copy of the will of 1866 and consulted the 2nd Grade Pleader, Venkanna Pantulu, as to the rights under it, and the latter expressed an opinion that it gave the whole property to Niladri. Sami Rao must have known that their attempt to act upon the will of 1866 would have led to litigation since Appa Rao would not be likely to easily give up the position he had long enjoyed with respect to the family property.

Sami Rao would also have been anxious to secure the long admitted rights of Appa Rao. When, Niladri was suddenly attacked with cholera and was likely to die, the time was favourable for attempting to secure Appa Rao's position and to prevent future litigation by concocting a will in the terms of Exhibit K. Venkanna Pantulu and Jaladanki Venkayya the sheristadar of the estate would be the natural persons from whom to seek assistance. If their co-operation were secured the signatures of any number of persons could easily be procured on a representation that the will was prepared at the request of, and was signed by, the testator even though the witnesses had not really seen him sign the will. This would be done the more easily when it was known that the will was such as Niladri might probably have left. Once the witnesses had signed their names they would be afraid to admit that they had not really seen Niladri sign, and would thus become witnesses to the genuineness of the will. These suggestions are supported by the fact that there was no attempt to make a will until Venkanna Pantulu arrived, late at night, from his village, some four or five miles away and by the fact that none of the relations signed the will. Even Sami Rao

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refrained from doing so, in order that less attention might be drawn to him, and that he might not be suspected of any concern in getting it up. The admitted circumstance that Exhibit K was written at Venkanna Pantulu's dictation goes far to shew that he was its true author.

Venkanna Pantulu's statement is that he heard casually about 8 P.M. that Niladri was ill with cholera and went over to enquire for him. It is hardly likely that he would have gone so considerable a distance so late at night merely for this purpose, but his presence and protracted stay at the house is explained if we understand that Sami Rao urgently required his advice and assistance.

It was possible to get up the will without much fear of either the appellant or the 1st respondent at once coming to learn the truth; for they were both absent from the place where Niladri was lying ill—the appellant being confined to her apartment in the zenana and the 1st respondent having been kept away on the ground that it was dangerous for him to visit a man suffering from cholera.

Sami Rao's subsequent conduct is also consistent with the conclusion that the will was his handiwork. For, his presence when the 1st respondent and the appellant on the 5th September made statements before the Tahsildar referring to Exhibit K and asking that effect should be given to it, as well as his accompanying the 1st respondent when a few days later the latter called on the Collector in connection with the registry of the appellant and himself, showed that Sami Rao was active in getting the appellant and the 1st respondent to proceed as if the spurious document were genuine so that they might both be committed to it as soon as possible. Had Sami Rao lived, it is possible his influence might have insured that the origin of the will should have been kept a secret. As it was, his death was speedily followed by the 1st respondent denouncing the will and filing his suit to set it aside.] *

**[224]** To sum up then: We find that the will of 1866 was revoked, that there was no right of survivorship between Niladri and Appa Rao, that on Niladri's death the appellant as his widow succeeded to his property and that the will of 1892 is not genuine. The result of these findings is that in appeal suit 164 there will be a decree for partition and delivery to the appellant of a moiety of the disputed properties including the inam lands in the hands of the second respondent with proportionate mesne profits from 1st December 1892 until delivery of possession or three years from date of decree, the amount thereof to be ascertained in execution. Provided, however, that the following items in Schedule C1 shall be excluded:—Nos. 3, 17, 22, 23, 38, 75, 77, 81 and 87; and provided also that Nos. 37, 51, 97, 98, 103 and 121 in the schedule to the Commissioner's report be included. Item No. 7 in plaint schedule C1 should be described as 'a box' only, and item No. 79 in the same Schedule should be described as containing only two pearls. In appeal suit No. 165 there will be a declaration that Exhibit K is not genuine. In other respects both the suits must be dismissed, the parties will pay and receive proportionate costs in each case in the Lower Court as well as in this Court. The decrees of the Court below will be modified accordingly.

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* Here ends that portion of the judgment which has been omitted in the I.L.R.—ED.

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## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Davies.*

MUTHIA CHETTI (*Respondent*), *Appellant v.* ORR (*Appellant*), *Respondent.**

[26th November, 1895 and 23rd February, 1897.]

*Execution—Receiver—Moneys collected by receiver in execution of decree misappropriated by him—Discharge of judgment-debtor.*

In execution of a decree a receiver was appointed to collect certain rents due to the judgment debtor. Some of the judgment-debtor's tenants paid the rents due by them into the hands of the receiver, but the receiver did not pay the money into Court:

[225] *Held per Shephard, J.*, that the payment by the tenants to the receiver did not *pro tanto* discharge the judgment-debtor from liability under the decree.

*Held per Davies, J.*, that payment by the tenants to the receiver *pro tanto* discharged the judgment-debtor from liability under the decree.

APPEAL under Section 15 of the Letters Patent against the order of MUTTUSAMI AYYAR, J., in appeal against appellate order No. 63 of 1892(1).

The respondents were the holders of a decree passed in original suit No. 415 of 1884 on the file of the District Munsif of Sivaganga against the appellant and others. A certain portion of the amount due on the decree was collected at various times. On 31st August 1889, on the application of the respondents a receiver was appointed to collect the melvaram payable to the appellant by the tenants of the village of Kambanur for fasli 1299. The evidence showed that the receiver had collected a sum of Rs. 845-2-7. But he did not pay this money into Court and absconded. The respondents then in April 1891 put in another application for the execution of the decree praying for the arrest and imprisonment of the judgment-debtor and the attachment and sale of his moveable properties. In this application the respondents did not give the appellant credit for the sum of Rs. 845-2-7 collected by the receiver. The appellant opposed the issue of execution on the ground that the decree debt had been satisfied by the sum collected by the receiver.

The Munsif and on appeal the District Judge allowed the appellant's contention.

On appeal to the High Court MUTTUSAMI AYYAR, J., reversed the order of the District Munsif and the District Judge.

The appellant now appealed under Section 15 of the Letters Patent.

Mr. *Johnstone*, for appellant.

Mr. *Ryan*, for respondent.

SHEPHARD, J.—The point raised by this appeal is one on which authority is naturally scanty, because it could hardly arise if ordinary care were taken. It seems that, in execution of a decree obtained by the respondent, a receiver was appointed to superintend the harvest and collect the melvaram payable to the appellant. It [226] is not explained why such an expensive and cumbrous way of executing an ordinary decree was adopted. The receiver thus appointed apparently was not required to give, and, anyhow, did not give the security which the 503rd

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* Letters Patent Appeal, No. 21 of 1895.

(1) 17 M. 501.

section of the Code requires. He collected certain moneys on account of melvaram, but instead of paying them into Court, misappropriated them and absconded. A fresh application having been made for execution, the appellant met it by claiming credit for the moneys so collected, but not paid into Court. The question is whether the appellant, the judgment-debtor, or the respondent, the decree-holder, must bear the loss occasioned by the defalcation of the receiver. Mr. Justice Muttusami Ayyar reversing the order of the Courts below has decided the question in favour of the decreee-holder, and I have arrived at the same conclusion. Such authority, as there is, is in favour of it, although it must be admitted that the circumstances of Lord Massareene's (1) case were quite different from those of the present case. The case is one which cannot be decided upon any theory of agency. A receiver appointed to collect moneys is not an agent of either party; he is an officer of the Court deputed to collect and hold the moneys collected by him in accordance with the orders of the Court. The party at whose instance a receiver is appointed has no greater or less control over his acts than the other party to the litigation. It is by the Court only that he can be dismissed as well as appointed. The argument on behalf of the appellant was to the effect that, as he or the tenants indebted to him were bound to pay the melvaram to the receiver, so a payment by them must *pro tanto* operate as a complete discharge. Unless such discharge and satisfaction of the decree was effected by the payment, the appeal must clearly fail. What then is there in the provisions of the Code to justify us in holding that a judgment-creditor must be deemed to be satisfied by the mere fact of a receiver getting in moneys due to the judgment-debtor? The ordinary right of a judgment-creditor is to have the amount of his debt paid into his own hands. As to that proposition, I apprehend there can be no doubt; see *Soobul Chunder Law* v. *Russick Lall Mitter* (2). The money may be paid out of Court immediately to the judgment-creditor or it may be paid into Court and taken out by him. Then only is he bound to certify to the Court under [227] Section 258 the fact of payment. There is a special provision in the 336th section of the Code entitling the debtor to personal release on his paying the money to an officer of the Court, and there is a similar provision in the 341st section for the case of a debtor in jail paying the money to the officer in charge of the jail. But in the latter section it is expressly declared that a discharge under it does not operate as a discharge of the debtor from his debt. It is a personal discharge only. These provisions, which were relied upon by the appellant's counsel, so far from supporting his argument, rather indicate that, as a general rule, the receipt of money by an officer of the Court is not by itself a good discharge. Payment into Court by the judgment-debtor stands on a different footing. It is expressly recognized by the 257th section, and a debtor, who, on his debt being attached under the 268th section pays the money into Court, is discharged as effectually as if he had paid it to his creditor. In the present case we are not concerned with any question as to the discharge of a third person, nor with the case of a payment made by the judgment-debtor. The money which came to the receiver's hands was collected by him from persons who were indebted to the judgment-debtor. There was no payment by the judgment-debtor either out of Court to the judgment-creditor or into Court. The most that the judgment-debtor can say is that his tenants have paid to the receiver moneys due to him and obtained thereby

(1) *Hutchinsen* v. *Massareene*, 2 Ba. & Be. 49. (2) 15 C. 202.

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a good discharge. The Code does not provide that such a payment shall be deemed equivalent to a payment by the judgment-debtor to the judgment-creditor personally. A provision to that effect would be inconsistent with the scheme of the Code and the position of a receiver—for a receiver who has collected moneys due to the judgment-debtor does not hold them for the judgment-creditor. He holds them for the Court in order that the Court may decide regarding them. (See *In re Dickinson* (1).) Even if the moneys had been paid into Court it would not necessarily follow that the judgment-creditor would have been satisfied.

There is an apparent hardship in holding that a judgment-debtor whose tenants have made payments to a receiver may be called upon a second time to pay money in satisfaction of the decree. The answer to that is that, if he thought the receiver was **[228]** not a person to be trusted, he ought to have insisted on the Court's taking proper security. It is begging the question to say that it was not his business, but that of the judgment-creditor to see that security was given.

When once it is admitted that the receiver is not the agent of either party and that the decree-holder, until full satisfaction of the decree has been obtained, is entitled to go on executing his decree, the only question is whether the decree has in fact been satisfied. Is the judgment-debtor in a position to call upon the judgment-creditor to show cause under the provisions of the 258th section ? In my opinion the question must be answered in the negative and therefore the appeal should be dismissed.

DAVIES, J.—A receiver was appointed by the Court under Section 503, Code of Civil Procedure, at the instance of a judgment-creditor holding a money decree to execute his decree by taking possession of and selling crops, or rather the melvaram share thereof, belonging to the judgment-debtor. The receiver acted accordingly, but instead of remitting the sale-proceeds amounting to Rs. 845 odd to the Court, he embezzled the amount and absconded. As no security had been taken from the receiver as it ought to have been, the money is lost and is irrecoverable. The judgment-creditor has now applied to the Court to again recover the decree amount from the judgment-debtor without giving him credit for the amount already collected by the receiver. The question, therefore, is whether the judgment-debtor is liable to pay that amount over again owing to the defalcation of the receiver, or whether the loss must be borne by the judgment-creditor.

The District Munsif and the District Judge held that the judgment-creditor must be the sufferer on the ground that the property which was available for the satisfaction of the decree-debt had been taken from the control of the owner, the judgment-debtor, at the instance of the judgment-creditor who had applied for the appointment of the receiver, and had not seen that due security was given by him, whereas the judgment-debtor was in no way to blame.

The learned Judge of this Court has held to the contrary, ruling that the loss occasioned by the receiver's default must, in accordance with English precedents, fall upon the estate, and as the estate in this case was the estate of the judgment-debtor, it was the **[229]** judgment-debtor who must bear the loss. The rule is no doubt equitable enough where the parties have all got an interest in the estate, because the loss is shared by them all, but here the case is quite different.

In this Court, it is urged on the one hand that the receiver should be

(1) L.R. 22 Q.B.D. 187.

treated as the agent of the judgment-creditor, as it was on his motion the receiver was appointed, and as it was the judgment-creditor's fault that due security was not taken, he should bear the loss. On the other hand it is argued that the decree-debt has not been satisfied and that the judgment-debtor's liability to pay it lasts until the judgment-creditor is actually paid the money due.

The solution of the difficulty appears to me to lie in the determination of the question as to when a judgment-debtor is to be considered discharged of the decree-debt, and the correct answer is, in my opinion, when he has paid the money into Court, or out of Court to the decree-holder, or otherwise as the Court directs. Section 257 of the Civil Procedure Code is my authority for the proposition. It directs that "all money payable under a decree shall be paid" in one of the three modes stated above, and although there is no express declaration that such payment operates as a discharge of the decree-debt, it seems obvious that when the judgment-debtor has paid the money payable by him in the manner in which the law directs him to pay it, he can do no more, and is henceforth absolved from further liability, or in other words, has discharged his debt. It will be conceded that a payment direct to the decree-holder—the judgment-creditor himself—subject of course to the certificate required by Section 258 to be given to the Court is a valid discharge, and we find classed with such valid discharge, two other alternative modes of discharge, entirely free from any condition or proviso such as payment out of the Court to the decree-holder is subject to. The three modes of payment being classed together as alternative courses, they must be taken to be of equal efficacy, and when one course is shown to have the effect of a discharge, it follows that the others have the same effect. I take it therefore that there is a distinct implication from the directions in the section itself, that a payment into Court, or otherwise as the Court directs, of the money "payable under a decree" is an absolute discharge of the judgment-debtor as it is unconditional, just as a payment to the decree-holder [230] becomes a complete discharge on compliance with a subsequent condition. It must be remembered that the Court holds money so paid into it to the credit of the decree-holder, and there are various provisions of law indicating that a payment into Court by a debtor is tantamount to a payment to the party entitled to receive it. I may instance the case of a garnishee which seems directly in point. The payment of the amount of his debt into Court "shall discharge him as effectually as payment to the party "entitled to receive the same" as declared in Section 268 of the Code of Civil Procedure. Then there are the cases of payment of a deposit into Court (*a*) by a defendant under Section 376 of the Code of Civil Procedure which is regarded under the following section as held by the Court on plaintiff's account to whom it shall be payable, and (*b*) by a mortgagor under Section 83 of the Transfer of Property Act which is held "to the account of the "mortgagee." Decrees for foreclosure and redemption drawn up under Sections 86 and 92 of this Act also provide for payment into Court as being equivalent to payment to the plaintiff or the defendant as the case may be. Supposing that in any of these cases the money paid in were to be misappropriated by a servant of the Court or of the Bank or treasury where the money was kept, it surely could not be contended that the depositor, or the person who had made the payment under the decree, was bound to make good the loss by paying twice over. It would indeed be a case of "*bis vexari*" if the Court should issue process to recover an amount already paid to it. This convinces me that payments made into or by

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order of Court under plain directions of the law are good and valid discharges of the debts on account of which the Court itself undertakes to receive them, and that any loss accruing thereafter cannot be charged to the person making the payment, and if anybody is to be held responsible, it must be the officers of the Court or their master the Government. If payments into Court or payments made as ordered by the Court are valid discharges, as in my opinion they are, the further question arises in this case whether the receipt by the receiver of the money which he had realized by sale of the judgment-debtor's property amounted to a payment under direction of the Court, for it is not pretended the money ever reached the Court, so as to be deemed as having been paid into it. Now I presume that payments made to bailiffs executing a warrant of arrest or a warrant of attachment [231] and authorized to receive them, would be considered cases falling under Clause (*c*) of the Section 257 as payments made "otherwise as the Court directs." These processes against the person or the property of the judgment-debtor are issued under the authority of Section 254 of the Code, and the forms are to be found in the fourth schedule Nos. 136 and 154. Each form provides for payment being made by the judgment-debtor to the process server of the amount of the decree and costs of execution, in which case the warrant ceases to have effect, the judgment-debtor being released from custody in the one case or his property in the other, these directions being more expressly given in Sections 336 and 275 of the Code itself. This latter section is instructive as showing that payment into Court is a satisfaction of the decree so far as the judgment-debtor is concerned, as may be gathered from the wording, "if the amount decreed with costs, &c., be paid "into Court, or if satisfaction of the decree be otherwise made through the "Court." But this is by the way. From the references made it cannot be doubted that a payment to an officer of the Court under direction of the Court is as effectual as a payment made directly into Court. The case of a receiver seems precisely on the same footing. He is an officer of the Court equally with a bailiff or a process server, and he collects the money due under the decree also by direction of the Court, and payment to him is therefore as good and valid as to the Court itself, falling as it does under Clause (*c*) of Section 257. In this view I come to the conclusion that the judgment-debtor, appellant in this case, has discharged the decree-debt in execution to the extent of the Rs. 845 and odd of money collected by the receiver, and that execution can proceed only for the balance due if any. I would therefore reverse the decision under appeal and restore that of the District Munsif with appellant's costs throughout to be paid by the respondent.

It appears that the appointment of the receiver was made by the Munsif without the express authorization of the District Court, which is required by Section 505 of the Code, but as the appointment has been treated throughout as a valid one, its validity cannot well be questioned at this late stage of the case; at any rate it is a matter to which the principle of "*quod fieri non debet factum valet*" may most appropriately be applied.

In consequence of the difference of opinion between their Lordships, the case was referred to the Full Bench consisting of [232] COLLINS, C.J., SHEPHARD and DAVIES, JJ., who delivered the following

## JUDGMENT.

The appellant not being represented and not appearing, we dismiss the appeal with costs. Under the provisions of Section 575, Civil Procedure

Code, the order of this Court, dated 24th January 1894, in *Orr* v. *Muthia Chetti* (1) prevails, and the order of the District Court of Madura, dated 26th August 1892, passed on C.M.A. No. 8 of 1892, is reversed with costs.

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**20 M. 232 = 7 M.L.J. 100.**

## APPELLATE CIVIL.

*Before Mr. Justice Davies and Mr. Justice Boddam.*

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SUBRAMANIAN CHETTI AND OTHERS (*Plaintiffs*), *Appellants* v. RAKKU SERVAI AND OTHERS (*Defendants*), *Respondents*.*
[7th January, 1897.]

*Succession Certificate Act—Act VII of* 1889, *Section* 4—*Debt due to Hindu family jointly.*

In a suit by the members of a joint Hindu family for a debt due on a document which is executed in favour of a deceased member of the family, but on the face of which it does not appear that the debt is a joint debt, the plaintiffs need not produce a certificate under the Succession Certificate Act, if they can prove that the debt was due to the family jointly :

*Venkataramanna* v. *Venkayya* (2) explained.

*Quære* : whether a plaintiff, in a suit to recover money by the sale of property mortgaged, need produce a certificate under the Succession Certificate Act.

[F., 22 M. 380; R., 4 L.B.R. 99.]

SECOND appeal against the decree of P. Narayanasami Ayyar, Subordinate Judge of Madura (West), in appeal suit No. 763 of 1894, reversing the decree of S. Ramasami Ayyangar in original suit No. 158 of 1894.

The suit was brought on a mortgage executed by the first defendant, the managing member of a joint Hindu family consisting of himself and defendants Nos. 2 to 5. The mortgage was executed on the 15th of November 1870 and provided that the mortgagee should enjoy the property for four years, after which [233] time the mortgagee might redeem on payment of the mortgage money. The mortgage was executed in favour of Nachiappa, the father of plaintiffs Nos. 1 and 2, and on his death (some time before 1881) the mortgage-debt passed by survivorship to his sons and his brother Subramanian Chetti. Subsequently Subramanian Chetti assigned his share to plaintiff No. 3. The plaintiffs were for some time in possession of the land when, as they alleged, they were ousted by the defendants. They now sued to recover the amount due under the mortgage-deed by the sale of the property mortgaged. The District Munsif decreed for them. On appeal the Subordinate Judge reversed the decree of the District Munsif on the ground that the plaintiffs had not produced a certificate under the Succession Certificate Act. He said, " there is nothing in Exhibit A to show that the debt " was a joint debt, due to the father and sons. In *Venkataramanna* " v. *Venkayya* (2) the Madras High Court have held that a Hindu is not " entitled to sue on a bond executed in favour of his undivided father, " deceased, without the production of a certificate under Act VII of 1889, " unless it appears on the face of the bond that the debt claimed was due

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* Second Appeal No. 1130 of 1895.

(1) 17 M. 501. (2) 14 M. 377.

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"to the joint family consisting of the father and the son. The District "Munsif dwells on this point in paragraph 6 of his judgment. The "defendants have taken an issue on the question, and there is no "admission. Under Section 4 of Act VII of 1889, no Court can pass a "decree unless a certificate is produced. The arguments of the District "Munsif are not supported by law. In the recent Full Bench case of "*Fateh Chand* v. *Muhammad Bakhsh* (1), it has been held by the Allahabad High Court that production of certificate of succession is a condition "precedent to decree in a suit for sale onmortgage, dissenting from the "ruling of the Calcutta High Court in *Kanchan Modi* v. *Baij Nath Singh*(2). "Therefore, following the rulings of the Madras and Allahabad High "Courts, the suit ought to have been dismissed."

The plaintiffs appealed on the following grounds :—

(1) That the Subordinate Judge is wrong in holding that a succession certificate was necessary.

(2) The debt being due to an undivided family and the suit being one for sale of mortgaged property, the Act does not apply.

[234] (3) Even if succession certificate was necessary the Subordinate Judge should have merely given time to the plaintiffs for producing it and not dismissed the suit.

*Krishnasami Ayyar*, for appellants.

*Sivasami Ayyar*, for respondents.

## JUDGMENT.

As the Munsif found that the debt was a joint debt and that finding was not disputed in appeal, we must decide, following *Venkataramanna* v. *Venkayya* (3), that no succession certificate was necessary. The strict interpretation put on that case by the Subordinate Judge, *viz.*, that it is only when the fact of the debt being a joint one appears on the face of the document that a certificate is not necessary, has not been adopted by this Court itself which has recognized other proof of the debt being joint beyond what appears on the face of the document.

It has further been urged that this being a suit on a mortgage for sale of the mortgaged property, the Succession Certificate Act does not apply, and the case of *Baij Nath Das* v. *Shamanand Das* (4) has been relied on in support of the contention. That case, however, is in conflict with the Full Bench case of *Fateh Chand* v. *Muhammad Bakhsh* (1). We are not called upon to decide the matter now, as we find for another reason that no certificate was required. The second appeal must, therefore, be allowed, and we reverse the decree of the Lower Appellate Court and restore that of the District Munsif. The appellants' costs in this and the Lower Appellate Court must be paid by the respondents. The time for payment of the mortgage money is extended to three months from this date.

(1) 16 A. 259. (2) 19 C. 336. (3) 14 M. 377. (4) 22 C. 143.

20 M. 235 = 1 Weir 697 = 2 Weir 40.



## APPELLATE CRIMINAL.

[235] *Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Shephard.*

QUEEN-EMPRESS *v.* KATTAYAN AND OTHERS.* [15th July, 1897.]

*Warrants issued under Act XIII of* 1859—*Execution outside jursidiction—Criminal Procedure Code, Section*, 83.

Section 83 of the Criminal Procedure Code applies to warrants issued under Section 1 of Act XIII of 1859, and consequently such warrants may be executed outside the local jurisdiction of the Magistrates issuing them.

[F., 20 A. 124 = A.W N. (1897), 220 : R., 6 Bom. L.R. 255 (257) = 33 B. 22.]

CASE referred for the orders of the High Court under Section 438 of the Code of Criminal Procedure by J. K. Batten, Acting District Magistrate of Trichinopoly.

The case was stated as follows:—

"The second-class Stationary Magistrate of Kulittalai in this district "has received three warrants issued, apparently under Section 1 of Act "XIII of 1859, by the second-class Magistrate of Coonoor for the arrest "of three persons resident in this district.

"As the Government of India is advised that there is reasonable "room for doubt whether the provisions of the Code of Criminal Procedure "(1882) regarding warrants apply to warrants issued under Section 1 of "Act XIII of 1859, and whether a warrant under that Act can be executed "at all outside the jurisdiction of the Court which issues it, I have the "honour to request an authoritative ruling on the point."

The Public Prosecutor (Mr. *Powell*), for the Crown:

I am instructed to put before the Court the arguments for and against the legality of executing warrants issued under Section 1 of Act XIII of 1859 outside the jurisdiction of the Court issuing them. Whether such a procedure is legal or not depends upon [236] whether Section 83 of the Criminal Procedure Code applies to these warrants, for there is no other provision by which they could be executed outside the jurisdiction.

First as to the considerations which would seem to show that the procedure in question is illegal, and that Section 83 of the Criminal Procedure Code does not apply to these warrants: Sections 75 and 93 of the Code would seem to limit the provisions of Chapter VI, in which Section 83 occurs, to warrants issued under the Code. Now warrants issued under the Code, as opposed to warrants not issued under the Code, must mean warrants for the arrest of persons triable under the Code. But the workman for whose arrest a warrant is issued under the Act is not triable under the Code. Only those persons are triable under the Code who are charged with having committed an offence (see Section 5 of the Code), *i.e.*, with having done some act which renders them liable to punishment [Section 4, Clause (*p*)]. Now the workman for whose arrest a warrant is issued under Act XIII of 1859 has done nothing punishable; he only becomes liable to punishment when he has failed to obey the Magistrate's order directing him to repay the advance or perform the work. It would, therefore, appear that when the warrant

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* Criminal Revision Case No. 29 of 1897.

[*N.B.*—The same ruling was given in 20 M. 457, *infra*.—ED.]

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issues he is not triable under the Code and that consequently the warrant is not issued under the Code.

Next as to the considerations which show that Section 83 of the Criminal Procedure Code is applicable to warrants issued under Act XIII of 1859: The reasoning which I have put before the Court assumes that the fraudulent breach of a contract is not an offence within the meaning of the Code, because it is not the mere breach of contract which is punishable, but the failure to obey the order of the Magistrate. But the preamble to Act XIII of 1859 would show that it was intended to punish fraudulent breaches of contract; for it declares that "the remedy by suit in the Civil Courts for the recovery of damages is wholly insufficient, and it is just and proper that persons guilty of such fraudulent breaches of contract should be subject to punishment;" and the Act prescribes the modes of bringing such fraudulent breaches of contract to punishment.

Moreover before the Procedure Code of 1882 was passed, it seems clear that warrants issued under Act XIII of 1859 could be executed outside the jurisdiction. At the time when that Act was passed, Acts VII of 1854 and XVII of 1856 were in force; [237] and under Section 5 (1) of the former Act and Section 1 (2) of the latter Act, warrants issued under Act XIII of 1859 could have been executed outside the jurisdiction. Before these Acts were repealed, the Criminal Procedure Code, Act XXV of 1861, came into force. Under Section 84 of that Code, warrants could be issued outside the jurisdiction of the Magistrate issuing them. The provisions of that Code were, by Section 21, applicable to all offences,

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(1) Section 5 of Act VII of 1854 was as follows:—

The warrant of any Magistrate or Justice of the Peace having jurisdiction in any part of the territories under the Government of the East India Company for the arrest of any person charged with having committed any offence, whether such warrant be issued under the provisions of this Act or not, may be executed within the jurisdiction of any other Magistrate or Justice of the Peace having jurisdiction in any part of the said territories, whether in the same presidency or not, upon having a written authority under the hand and seal of the Magistrate or Justice of the Peace within whose jurisdiction it may be executed, previously endorsed thereon, and which endorsement may be to the following effect:—

To the Nazir [or other officer as the case may be] of the Zillah of

"This warrant may be executed in the Zillah or District of

[describing the Zillah or District of the indorsing Magistrate or Justice of the Peace] by any of the officers to whom the same is directed or by

" [describing by his name of office the officer to whom a similar warrant, issued by the indorsing Magistrate of Justice of the Peace, would be directed.]

(2) The preamble to Act XVII of 1856 and Section 1 thereof were as follows:—

Whereas by Act VII of 1854, certain provisions were made for the execution, in any part of the territories under the Government of the East India Company, of warrants of arrest issued by competent officers in any other parts thereof, and whereas it is expedient that similar means should be provided for the execution as aforesaid of all other criminal process issued as aforesaid, it is enacted as follows:—

Any criminal process whatever including summonses, subpœnas, and search warrants, as well as warrants of arrest, issued by any Magistrate having jurisdiction in any part of the territories under the Government of the East India Company, may be executed within the jurisdiction of any other Magistrate having jurisdiction in any part of the said territories, whether in the same Presidency or not, upon having a written authority under the hand and seal of the Magistrate within whose jurisdiction it is to be executed previously endorsed thereon. Provided that no summons or subpœna shall be issued by a Magistrate to compel the attendance of a defendant or witness from any place beyond the local limits of his jurisdiction, unless special ground shall be proved to the satisfaction of the Magistrate in support of the application, which grounds shall be recorded before the summons or subpœna is issued.

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whether under the Penal Code, or under any special or local law, triable by Criminal Courts. Now the word offence was not defined in that Code and consequently was not restricted to punishable acts. The effect of this was to make Section 84 of the Code applicable to warrants issued under Act XIII of 1859, [238] because the word offence would cover fraudulent breaches of contract. The same reasoning applies to the Code of 1872, in which the corresponding sections were Section 8 and Section 167, and in which the word offence was not defined.

Again by Sections 7 and 8 of the Code of 1872, all criminal trials, and by Section 6 all enquiries by Magistrates were to be held according to the provisions of the Code. It cannot be denied that even in its first stage a case under Act XIII of 1859 is either a criminal trial or an enquiry. The only reported case that can be found with reference to this is *Pollard* v. *Mothial* (1), where the question was whether a case under Act XIII of 1859 could be tried summarily. The point deserving of notice in this case was that all the Courts dealing with it accepted the fact that the Criminal Procedure Code governed Act XIII of 1859. The Procedure Code Act X of 1882 for the first time defined the word 'offence' (as an act or omission made *punishable* by any law). It is unreasonable to suppose that the Legislature by this mere definition intended to take away from Magistrates issuing process under Act XIII of 1859, the right so essential for its working and so long existent of having process executed in another jurisdiction. Had this been the intention, it would have been clearly expressed.

If the new Code does not apply to Act XIII of 1859, there is no provision of law and no procedure prescribed governing the proceedings before a Magistrate under that Act. How is the Magistrate to secure the attendance of witnesses and what process is to be adopted to compel production of documents?

If process cannot be executed beyond the jurisdiction of the Sub-Magistrate, *e.g.*, if the Sub-Magistrate of Coonoor cannot issue any summons or warrant beyond a radius of 5 or 6 miles, and can neither summon a defaulting cooly from Ootacamund, nor issue a bailable warrant for him in Mettupalaiyam, Act XIII as a safeguard of the planting interest is absolutely valueless.

## ORDER.

We are clearly of opinion that Section 83 of the Criminal Procedure Code is applicable to warrants issued under the provisions of the Act XIII of 1859. There are no words in that section limiting the operation of it to warrants issued under the Code. The reference to warrants issued under the Code made in Sections 75 and 93 cannot, we think, be taken to have the effect [239] suggested. It cannot be supposed that, if when the Code of 1861 and 1872 were in force, the sections in them corresponding to Section 83 of the present Code were applicable to warrants issued under Act XIII of 1859, that state of the law was intended to be altered in the Code of 1882. To hold that none of the provisions of Chapter VI of the Code apply to such warrants would lead to the conclusion that there is no provision made for the issuing or executing of them. It is not necessary to say whether, under the Act of 1859, breach of contract is constituted an offence. The language of the Act appears to us to indicate that such was the intention of the Legislature, but at any rate the

(1) 4 M. 234.

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Act authorizes the Magistrates, on a complaint being made, to issue a warrant, and the only question is whether the provisions of the Criminal Procedure Code apply to that warrant. We think that the provision in question does apply.

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20 M. 239 = 6 M L.J. 266.

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

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*In Second Appeal No.* 792 *of* 1895:

PERIAVENKAN UDAYA TEVAR (*Defendant*), *Appellant v.* SUBRAMANIAN CHETTI (*Plaintiff*), *Respondent.**

*In Second Appeal No.* 1440 *of* 1895:

SUBRAMANIAN CHETTI (*Plaintiff*), *Appellant v.* PERIAVENKAN UDAYA TEVAR (*Defendant*) *Respondent.**

[5th, 7th, and 13th October, 1896.]

*Limitation Act, Section* 13—*Acknowledgment—Deposition signed by the debtor.*

To satisfy the requirements of Section 19 of the Limitation Act an acknowledgment of a debt must amount to an acknowledgment that the debt is due at the time when the acknowledgment is made.

A record made by a Judge of the evidence given by a debtor as a witness at the trial of a suit and signed by the debtor is a writing signed by the debtor within the meaning of Section 19 of the Limitation Act.

[R., 22 M. 32 (38) = 8 M.L.J. 219 (224); 10 Ind. Cas. 142 = 151 P.L.R. 1911 = 194 P. W.R. 1911.]

**[240]** SECOND appeals against the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East), modifying the decree of S. Ramasami Ayyangar, District Munsif of Sivaganga, in original suit No. 178 of 1894.

The plaintiff sued to recover from the defendant the sum of Rs. 963-3-11, together with interest thereon amounting to Rs. 419, which he alleged to be due under an agreement made in the year 1887.

The defendant is the present Zamindar of Sakkandi, and prior to 1887 his deceased brother was the Zamindar. Prior to the agreement now sued on, the defendant and his brother mortgaged to the plaintiff and his brother half of the village of Sakkandi. The plaintiff and the defendant's brother subsequently prevailed on several ryots of the village to execute in favour of the plaintiff muchilikas in which the occupancy rights in the village were recognized as belonging to the ryots who executed the muchilikas. The occupancy rights in the village were, however, claimed by one Kylasam Chetti, and in 1887 the late Zamindar (the defendant's brother), agreed to indemnify the plaintiff against the costs of any suit that Kylasam Chetti might bring in respect of his occupancy rights. Kylasam Chetti brought a suit (original suit No. 1 of 1888 on the file of the Sub-Court) against the plaintiff and the ryots asserting his occupancy rights in that village and obtained a decree. Kylasam Chetti took out execution for his costs. One warrant was issued for Rs. 620 against the ryots; this sum

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* Second Appeals Nos. 792 and 1440 of 1895.

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the defendant paid having borrowed the money for that purpose from one Annamalai Chetti. Another warrant for Rs. 963-3-11 was issued against the plaintiff. On the 8th November 1890, plaintiff paid the sum of Rs. 963-3-11, which he now sued to recover with interest. The suit was instituted on the 21st June 1894; and the plaintiff relied on an acknowledgment contained in a deposition given by the plaintiff in original suit No. 451 of 1891 on the 7th April 1892 as giving a fresh starting point to the period of limitation.

The deposition was in the following terms:—

"I know of the attachment process having been brought in original "suit No. 1 of 1888. When the process was brought I executed a promis-"sory note for Rs. 1,000 to Annamalai Chetti for the amount the ryots had "to pay. The process against the ryots was for Rs. 600 and odd. It was "for Rs. 1,600 and odd. [241] The promissory note I executed for Rs. "1,000 was on account of the process of attachment and arrest brought "against the ryots in original suit No. 1 of 1888. It is not true that "Rs. 300 and odd out of this amount was due to Annamalai Chetti on prior "dealings. This promissory note is with Annamalai Chetti. A process was "brought against the plaintiff for Rs. 600 and odd and he paid this "amount as he was one of the defendants. Two processes were brought "then. One against the ryots for Rs. 1,000, and the other against the "plaintiff for Rs. 600 and odd.

"*Q*. The Zamindar had agreed to pay all the costs. Why did you "execute a promissory note for Rs. 1,000 only, and why did the plaintiff "pay the balance of Rs. 620 and odd?

"*A*. A warrant had been brought against him for this amount and so "he paid. He paid as he was one of the defendants (the first defendant). "This amount of Rs. 600 and odd also I was bound to pay under the "original understanding, but the plaintiff paid it, as a warrant was brought "for his arrest."

The defendant pleaded that he was not a party to the agreement; that the agreement was not supported by consideration; and that it was illegal.

Both the Lower Courts found that the agreement was supported by consideration, and that the defendant was a party to it. The District Munsif, however, held the consideration, for the agreement was illegal and dismissed the suit.

On appeal the Subordinate Judge reversed the decree of the Munsif. As to the acknowledgment contained in defendant's deposition, he said:

"Defendant's acknowledgment of liability in Exhibit B on account of "money paid by plaintiff under the warrant of arrest only covers 600 or "620 and odd rupees and not Rs. 963-3-11. Probably it is due to some "mistake or misapprehension, but I cannot go behind the document. To "the extent of the claim admitted, this is a good acknowledgment within "the meaning of Section 19 of the Limitation Act and in modification of "the Munsif's decree I shall direct defendant's payment to plaintiff of "Rs. 620 with interest at 6 per cent, from date of suit."

Both plaintiff and defendant appealed.

*Sundara Ayyar* and *Krishnasami Ayyar*, for appellant.

*Narayana Rau*, for respondent in second appeal No. 792.

*Narayana Rau*, for appellant.

[242] *Sundara Ayyar and Krishnasami Ayyar*, for respondent in second appeal No. 1440.

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## JUDGMENT.

We are clearly of opinion that there was nothing illegal or opposed to public policy in the contract between the parties, so as to render the plaintiff's suit unsustainable. With regard to the alleged bar by limitation, the appellant urges two pleas, *viz.*, (1) that an acknowledgment in a deposition made by a debtor is not sufficient to satisfy the requirements of Section 19 of the Limitation Act, inasmuch as a witness is bound to answer the questions put to him, and any acknowledgment cannot, therefore, be regarded as voluntary ; and (2) that, in fact, the terms of the acknowledgment in Exhibit B, relied on by the Lower Appellate Court are insufficient.

The first point was ably discussed in the case of *Venkata* v. *Parthasardhi* (1). The two learned Judges in that case took opposite views, but we have no hesitation in expressing our concurrence with the view adopted by Muttusamy Ayyar, J., *viz.*, that a deposition given and signed by a witness in a suit is as much a writing contemplated by Section 19 as is a letter addressed by him to a third party. There is nothing in the language of the section or in the policy on which it is founded to justify us in restricting its scope by excluding statements made in depositions or other proceedings before a Court of Justice. The form of the writing is immaterial. All that is necessary is that the acknowledgment should be in writing and should be signed by the party, or by his agent duly authorized in that behalf. The object was merely to exclude oral acknowledgments. It is true that a deposition is made on compulsion, and its form is often, in fact, generally, determined mainly by the frame of the questions put to the witness. In construing, however, the sufficiency of any alleged admission in a deposition, this fact should be carefully borne in mind, and this brings us to the second point urged upon us, *viz.*, that the words used by the defendant in Exhibit B are not such an acknowledgment as the Act requires. This contention, we think, is well founded. The words used are—"This amount of Rs. 600 and odd also I was bound to pay " under the original understanding, but the plaintiff paid it, as a warrant was " brought for his arrest." These words admit that a liability existed at the time [243] of the original understanding that is some three years before the acknowledgment was made, but they do not admit any liability as existing at the time that the statement was made. It is true that they do not deny such liability, but that is not sufficient. It is possible that, had the witness been given the opportunity, he might have stated that the debt had been satisfied subsequent to the original understanding, but it was not necessary for him then to have stated this. It was his duty to answer the questions put to him, and the statement cannot be construed as implying any admission beyond what is on a reasonable construction contained in the words themselves. To satisfy the requirements of the section, the words must be such as to show that there was an existing jural relationship, as debtor and creditor, between the parties at the time when the admission was made, or at some time within the period of limitation prescribed by law, according to the nature of the suit. In the present case, there is no such admission. The admission merely is that in 1888 the defèndant was bound to pay the sum. That admission might be made now without conflicting with the defendant's plea that the recovery of the debt is now barred.

(1) 16 M. 220.

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On this finding we must set aside the decree of the Lower Appellate Court, and dismiss plaintiff's suit with costs throughout. This involves the dismissal of second appeal, No. 1440 of 1895, with costs.

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20 M. 243.

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

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PALANI KONAN (*Plaintiff*), *Appellant v.* MASAKONAN AND OTHERS (*Defendants*) *Respondents.**
[17th October, 1896.]

*Hindu Law—Suit by a purchaser from a co-parcener—Decree for share of co-parcener in specific property.*

In a suit to recover possession of property purchased by the plaintiff, if it is found that the property is not the separate property of the plaintiff's vendor, but **[244]** belongs to the joint family of which plaintiff's vendor is a member, the plaintiff is not entitled to a decree for his vendor's share in that property and the suit must be dismissed.

[R., 24 B. 128 (134)=1 Bom. L.R. 620 (626); 23 M. 608 (611)=10 M.L.J. 141 (143); 25 M. 690 (716) (F.B.); 34 M. 269 (271)=7 Ind. Cas. 559=20 M.L.J. 743=8 M.L.T. 269=(1910) M.W.N. 380; 15 C.P.L.R. 156 (159); 23 M.L.J. 64 (76)= 11 M.L.T. 393=14 Ind. Cas. 524 (531); 32 P.R. 1908=151 P.L.R. 1908=75 P.W.R. 1908; 1 S.L.R. 133 (136), 2 S.L.R. 43 (47).]

SECOND appeal against the decree of T. Weir, District Judge of Coimbatore, in appeal suit No. 183 of 1893, reversing the decree of T. T. Rangachariar, District Munsif of Coimbatore, in original suit No. 353 of 1891.

Plaintiff sued to recover possession of certain land from defendants Nos. 1 to 4, by whom he alleged he had been dispossessed. He claimed to be the owner of the land by purchase from Karupayyi, the mother and guardian of the minor sons of Iyavu Chetty. The property in question had previously been purchased by Iyavu Chetty in this own name.

The defendants Nos. 1 to 4 denied the alleged dispossession, and set up title in Nachi Chetty, the brother of Iyavu Chetty. Nachi Chetty was thereupon made fifth defendant and contended that the land did not belong exclusively to Iyavu Chetty.

The Munsif found that the land was thes eparate property of Iyavu Chetty, and gave plaintiff a decree. On appeal the District Judge found that the property was the joint family property of Iyavu Chetty and Nachi Chetty and reversed the decree of the Munsif.

The plaintiff appealed on the following ground amongst others :—

" The plaintiff is, at any rate, entitled to the moiety belonging to " Iyavu and his sons, and the learned Judge ought not to have dismissed " the suit altogether."

*Desikachariar*, for appellant.

*Kasturi Rangayyangar*, for respondents.

## JUDGMENT.

The only ground urged upon us in this second appeal is that, even on the finding of the District Judge that Iyavu Chetty and Nachi Chetty

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* Second Appeal No. 762 of 1895.

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were undivided, and that the property sold to plaintiff was their joint family property, still the District Judge ought not to have dismissed the suit *in toto*, but should have given plaintiff a decree for one-half of the property, as being the share of Iyavu Chetty therein. We cannot admit this contention. The case of *Venkatarama* v. *Meera Labai* (1) is a clear authority for holding that the puchaser of an undivided [245] share of one member of a Hindu family in specific family property cannot sue for partition of that portion alone, and obtain delivery thereof by metes and bounds. Still less can he do so in a case like the present where he sues on an allegation that the property is the self-acquisition of the vendor, and it is proved that it is joint family property. The course, which the plaintiff should take is pointed out in the case to which we have referred. He can recover nothing in this suit.

The decree of the District Judge was, therefore, right. We confirm it and dismiss this second appeal with costs.

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20 M. 245 = 7 M.L.J. 222.

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

PERUMAL AYYAN (*Plaintiff*) *Appellant v.* ALAGIRISAMI BHAGAVATHAR AND OTHERS (*Defendants*). *Respondents.**
[14th October and 12th November, 1896.]

*Limitation—Article* 132, *Limitation Act—Hypothecation bond for payment on certain date—On default in payment of interest whole amount payable on demand—Meaning of "payable on demand."*

When a hypothecation bond provided for the repayment of the principal sum on a certain date with interest in the meantime payable monthly, and further provided that, on default in payment of interest, the principal and interest should become payable on demand:

*Held*, that the period of limitation prescribed by Article 132 of the Limitation Act, began to run from the date of the default. *Hanmantram Sadhuram Pity* v. *Bowles* (2) and *Ball* v. *Stowell* (3) distinguished.

[R., 22 M. 20 (22); 30 M. 426 (P.C.) = 4 A.L.J. 625 = 9 Bom.L.R. 1104 = 6 C.L.J. 379 = 11 C.W.N. 1005 (P.C.) = 34 I.A. 186 = 17 M.L.J. 444; 10 M.L.T. 258 (259); 16 O.C. 45 (47).]

SECOND appeal against the decree of J. W. F. Dumergue, District Judge of Madura, in appeal suit No. 829 of 1894, reversing the decree of K. Krishnama Chariar, District Munsif of Madura, in original suit No. 307 of 1894.

This was a suit brought on a registered bond to recover, by the sale of certain property thereby hypothecated, the sum of [246] Rs. 724-7-9, being the balance of principal and interest due on the bond.

The bond was executed on the 9th of February 1882 by the first defendant in favour of the plaintiff. Its terms are set out in the judgment. It provided for the payment of the principal in two years and for the payment of interest in the meantime monthly. On default in the payment of interest the principal with interest at an enchanced rate became

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* Second Appeal No. 850 of 1895.

(1) 13 M. 275. (2) 8 B. 561. (3) 2 A. 322.

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payable on demand. Default in payment of interest was made in March 1882, and, except for a payment of Rs. 150 on the 18th October 1885, the defendant had not paid anything on account of the bond. The plaintiff never made any demand for payment; but instituted this suit on the 18th June 1894. The defendants pleaded, amongst other things, that the suit was barred by limitation. The District Munsif held that Article 132 of the Limitation Act was applicable—a finding that was not disputed in appeal. He also held that the cause of action arose on the 9th February 1884—the expiry of the two years prescribed by the bond for repayment; and in the result passed a decree ordering the payment of the sum claimed with interest, and in default directing the sale of the hypothecated property.

On appeal the District Judge reversed the decree of the District Munsif. He held that the money became payable when the first default was made in payment of interest, that is, in March 1882. He further held that the payment of Rs. 150 on the 18th October 1885 did not operate under Section 20 of the Limitation Act to give a fresh starting point for the period of limitation since the money was not paid as interest, and that, if it was regarded as part payment of principal, the fact of payment did not appear in the handwriting of the first defendant.

The plaintiff appealed.

*Bhashyam Ayyangar*, *Pattabhirama Ayyar* and *Gopalasami Ayyangar*, for appellant.

*Sivasami Ayyar*, *Madahava Rau* and *Natesa Ayyar*, for respondents.

## JUDGMENT.

The only question argued before us is that of limitation. The decision on that question depends upon the construction to be placed on the terms of the bond as to the time when the money became due and payable. The bond runs as follows :—

**[247]** " As I have received Rs. 300 (three hundred) in respect of both " items in accordance with the said particulars, I shall pay you every " month Rs. 3, being the interest on the said amount at 1 per cent. per " mensem and (shall pay) the principal Rs. 300 in two years' time and " receive back this, the three deeds and the former debt-bond. If, in the " meantime, the hypothecated chits fall to my lot, I shall receive the sums " due thereon, and pay them endorsing payment herein below. If there be " default in making payments as aforesaid, in subscribing to the said chits, " or in paying the interest every month, I shall pay in full the principal " with interest at $1\frac{1}{2}$ per cent. on demand by the holder out of my said " hypothecated properties and other properties. I shall pay the commis- " sion due for taking the first collections."

This bond was executed on the 9th February 1882. If, therefore, the interest had been regularly paid, the principal would not have become due until the 9th February 1884, and the suit having been instituted within twelve years from that date, *viz.*, in June 1894, would not have been barred by limitation. It is, however, admitted that no payment at all was made until October 1885, and the Lower Appellate Court has found that the payment then made was not made on account of interest, but on the general account, and that this payment did not, therefore, give rise to a new *tempus a quo* so as to save the bar by limitation.

The Lower Appellate Court held that the money became due on the first default in payment of interest, *viz.*, in March 1882, and that, as

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the suit was not brought within twelve years from that date, it was barred.

It is admitted that there is nothing to show that any demand for payment was made by the plaintiff before the 9th February 1884, and it is argued by the appellant before us that, in the absence of such demand, the money did not become due until the 9th February 1884, and that the suit was, therefore, improperly dismissed as time-barred.

We do not think that this contention can be sustained. It is conceded that, if the bond ran simply "I shall pay the principal with interest on demand," no demand would have been necessary to make the money due, and that time would have run from the date of the bond, *Hempammal* v. *Hanuman* (1) and *Rameshwar* [248] *Mandal* v. *Ram Chand Roy* (2). The fact that there is a previous covenant to pay the money within a certain date does not, we think, alter the meaning or effect of the words in the later clause making the money payable on demand. The words 'on demand' must, we think, be regarded as a technical expression equivalent 'to immediately' or 'forthwith.' That, we think, was the intention of the parties. The defendant having failed to pay the interest according to the stipulation in the first part of the bond, the money became payable forthwith, and no actual demand was necessary to complete the plaintiff's cause of action.

The appellant's vakil has referred to *Hanmantram Sadhuram Pity* v. *Bowles* (3) and *Ball* v. *Stowell* (4), but neither of them is on all fours with the present case. In the former, the words were 'if so required,' and the High Court held that there was a deliberate omission by the plaintiff to realize the condition on which the amount should become payable. In other words, it held that the intention of the parties was that the money should not be payable unless and until the plaintiff required the defendant to pay it. In the second case, it was found that the money was to become due only on default in payment of both premia and interest, and there was no proof that there was default in payment of the premia.

In the present case, we are of opinion that the plaintiff's right to sue accrued on first defendant's first failure to pay the stipulated interest, that is, in March 1882. The Lower Appellate Court has found as a fact, that the payment made by first defendant in October 1885 was not made on account of interest. That is a finding of fact which we cannot question in second appeal. Time, therefore, ran against plaintiff from March 1882, and his suit, not having been brought within twelve years from that date, was barred by limitation and was rightly dismissed.

We, therefore, confirm the decree of the Lower Appellate Court and dismiss this second appeal with costs.

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(1) 2 M.H.C.R. 472.
(2) 10 C. 1033 (1034).
(3) 8 B. 561.
(4) 2 A. 322.

20 M. 249=7 M.L.J. 94.

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## [249] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

APPA RAU SANAYI ASWA RAU (*Plaintiff*), *Appellant v.* KRISHNAMURTHI (*Defendant*), *Respondent.** [4th December, 1896.]

*Limitation Act—Act XV of* 1877, *Section* 5—*Suit under Section* 77 *of Registration Act —Act III of* 1877—*Applicability of Limitation Act, Section* 5—*Filing of suit on re-opening of Court.*

When the period of limitation, prescribed by Section 77 of the Indian Registration Act, 1877, for suits brought under that section, expires on a day when the Court is closed, Section 5 of the Indian Limitation Act, 1877, does not apply, and the suit, if instituted on the day that the Court re-opens is barred.

[R., 22 M. 179=8 M.L.J. 265.]

APPEAL against the decree of N. Saminada Ayyar, Subordinate Judge of Ellore, in original suit No. 6 of 1895.

The facts of the case were as follows:—

The plaintiff, a Zemindar, obtained from the mother and guardian of the minor defendant (his tenant) a muchalka, which he sought to have registered by the Sub-Registrar of Gudivada. The mother and guardian of the defendant denied execution, and the Sub-Registrar declined to register the document. Thereupon the plaintiff appealed to the Registrar of Kistna, who rejected the appeal. The order of the Registrar was passed on the 6th December 1894, and the thirty days allowed by Section 77 of the Indian Registration Act, 1877, for the institution of a suit in the Civil Court for a decree, directing the document to be registered, expired on 5th January 1895. On that day the Court was closed, it then being the Christmas holidays. On the 8th January 1895, the Court re-opened and on the same day plaintiff filed this suit, praying for a decree ordering the Sub-Registrar of Gudivada to register the muchalka. The Subordinate Judge, relying on *Veeramma* v. *Abbiah* (1), dismissed the suit on the ground that it was barred by limitation.

The plaintiff appealed.

*Bhashyam Ayyangar* and *Gopalasami Ayyangar*, for appellant.

*Sivasami Ayyar*, for respondent.

## JUDGMENT.

**[250]** Though the precise point for decision in the Full Bench Case (*Veeramma* v. *Abbiah* (1)) related to the applicability of Section 7 of the Limitation Act alone to suits brought under Section 77 of the Registration Act, yet having regard to the reasoning, as a whole, adopted by the learned Judges in arriving at their conclusion that Section 7 did not apply, we think we cannot but hold, on the strength of that decision, that Section 5 also is inapplicable to such suits.

Arguments, however, have been urged before us, which appear to have considerable force in favour of the applicability of Section 5, but we think the question is concluded by the Full Bench decision, and consequently that we are not at liberty to discuss it.

The appeal fails and is dismissed with costs.

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* Appeal No. 188 of 1895.

(1) 18 M. 99.

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APPELLATE CIVIL.

20 M. 250.

20 M. 250.

## APPELLATE CIVIL.

*Before Mr. Justice Davies and Mr. Justice Boddam.*

NALLAPPA REDDI (*Plaintiff*), *Appellant*, *v.* RAMALINGACHI REDDI AND OTHERS (*Defendants*), *Respondents*.* [25th January, 1897.]

*Registration—Indian Registration Act*, 1877, *Section* 50—*Loss of sale-deed.*

When a deed of sale of immoveable property for more than Rs. 100 is lost within the time allowed for the registration of the same, the purchaser may bring a suit against the vendor to compel the execution and registration of a fresh deed ;

and if, after the execution of the lost sale deed, the vendor has resold the property by a registered deed and delivered possession thereof to another who has notice of the sale to the plaintiff, the latter is entitled, as against the subsequent purchaser, to a decree for the possession of the property.

[Rel., 12 C.L.J. 464=8 Ind. Cas. 794 (795) ; R., 2 Ind. Cas. 244 (246)=5 N.L.R. 70 (74) ; D., 1 L.B.R. 293 (296).]

SECOND appeal against the decree of C. Venkoba Chariar, Acting District Judge of Trichinopoly, in appeal suit No. 162 of 1891, modifying the decree of M. A. Tirumala Chariar, District Munsif of Kulitalai, in original suit No. 313 of 1890.

On the 10th of December 1889 the first defendant executed in favour of the plaintiff a sale-deed of certain land for Rs. 800, and [251] received from the plaintiff Rs. 280, part of the purchase-money, the balance being payable, as the plaintiff alleged, at the time of registration. The deed was never registered. But on the 22nd December it was, with some other things, stolen from the plaintiff's house, and the plaintiff had not succeeded in recovering it. In January 1890 the first defendant sold the land in question to defendants Nos. 2 and 3. The sale-deed to these defendants was registered, and under it they had been put in possession of the land. The plaintiff now sued to compel the first defendant to execute and register a fresh sale-deed and for possession of the land, or, in the alternative, for the return of the part purchase-money paid and for damages.

The District Munsif passed a decree directing the first defendant, on the plaintiff paying into Court the balance of the purchase-money, to execute and register a fresh sale-deed, and directing all the defendants to deliver up possession of the land to the plaintiff. On appeal the District Judge, in reversing the decree of the District Munsif, said :

"The District Munsif is, I think, clearly wrong in treating the suit as "if it was one for specific performance of a contract of sale. Here the "sale-deed was executed and delivered, but the title alone had to be perfect-"ed by registration of the deed. This was not done. The matter did not "stop with a mere agreement to sell, which would in that case be a mere "personal right enabling plaintiff to obtain a conveyance. There is no "allegation in the plaint that there was any contract that a fresh deed of "sale was proposed to be executed and registered. Section 27, Specific "Relief Act, has, I think, no application to this case, and the decree "directing the first defendant to execute a fresh deed of sale and to have "it registered, is, in my opinion, clearly unsustainable on the facts disclos-"ed in the case. I think, also, that the decision in I.L.R., 14 Madras,

* Second Appeal No. 1283 of 1895.

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"page 55, does not govern this case. I consider that the decision reported "in 16 Madras, page 341, shows the principles which govern cases of this "kind, and under the dictum therein ruled, the plaintiff has, I conceive, no "right to obtain a second conveyance.

"The District Munsif has also awarded possession to plaintiff, and in "this, I think, he is clearly wrong. The second and third defendants have "been in possession under a perfectly valid title. Their deed of sale "I is registered and they have possession. [252] Plaintiff's sale-deed "was unregistered, and therefore Exhibit I prevailed over it under Sec-"tion 50, Registration Act. The second and third defendants paid first "defendant Rs. 1,000 before the Sub-Registrar, and this fact is "endorsed on Exhibit I. There is nothing to show that this was a "sham payment. The defendants' first witness wrote it and he speaks "to its execution. There is nothing in the evidence or in the circum-"stances of the case to lead to any suspicion in the matter. Plaintiff "himself says that the first defendant asked him to take back his "Rs. 280, and permit him to sell the lands to second and third defendants "for Rs. 1,000, as they made him a better offer than plaintiff. I, "therefore, find the fourth issue for defendants Nos. 2 and 3. The "question of notice of a previous contract of sale does not arise in "this case."

The District Judge, however, granted the plaintiff a decree for Rs. 348, which sum was made up of the part purchase-money paid by the plaintiff with interest, interest on the balance which plaintiff had kept ready for payment on registration, and the value of the stamp paper on which the sale-deed had been engrossed.

Plaintiff appealed.

*Seshagiri Ayyar*, for appellant.

*Pattabhirama Ayyar*, for respondents.

## ORDERS.

The plaintiff's sale-deed having been lost, he was entitled to claim that the first defendant should execute a fresh deed of sale and register it, and assuming, as found by the Munsif that second and third defendants had notice of the sale to the plaintiff, he was further entitled to possession.

The cases applicable to this are *Nynakka Routhen* v. *Vavana Mahomed Naina Routhen* (1) and *Nagappa* v. *Devu* (2). In *Venkatsami* v. *Kristayya* (3) relied on by the District Judge, the sale-deed had not been lost, and so there could be no claim for specific performance. The District Judge's decision on this point is therefore wrong, and he is requested to find, on the evidence on record upon the issue, whether defendants Nos. 2 and 3 had notice of the sale to the plaintiff; in which case the Munsif's decree will have to be restored, and that of the District Judge reversed. The District Judge is requested to submit his findings within one month from the date of the receipt of this order. [253] Seven days will be allowed for filing objections after the finding has been posted up in this Court.

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(1) 5 M.H.C.R. 123. (2) 14 M. 55. (3) 16 M. 341.

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20 M. 253.

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

KALIAPPA GOUNDEN (*Plaintiff*), *Appellant* v. VENKATACHALLA THEVAN AND OTHERS (*Defendants*), *Respondents*.*
[14th October, 1896.]

*Madras Act II of* 1864, *Section* 38—*Sale for arrears of revenue—Confirmation of sale after cancellation.*

When a Collector has passed an order under Section 38 of Madras Act II of 1864, setting aside a sale for arrears of revenue, he cannot subsequently confirm the sale.

SECOND appeal against the decree of T. Weir, District Judge of Coimbatore, in appeal suit No. 211 of 1893, reversing the decree of T. T. Rangachariar, District Munsif of Coimbatore, in original suit No. 154 of 1892.

This was a suit to recover certain land with mesne profits. The land originally belonged to the first defendant, and for arrears of revenue due by him was sold by the Collector on the 20th March 1883 and purchased by the plaintiff.

On the 2nd November 1883 the Collector passed an order setting aside the sale. But on the 29th August 1884 he passed the following order:—

"Read arzi No. 515 of this year which you submitted, stating that "you had (already) under our order given certain information in detail "regarding the cancellation of the sale of the fields, Nos. 110 and 111 in "the village of Senjeri.

"The abovementioned order has been cancelled, and the sale of the "said lands is confirmed in the name of Senjeri Kaliappa Gounden who "purchased the said lands."

And on the 8th November 1884 the Collector issued a sale certificate in the name of the plaintiff.

[254] The District Munsif gave the plaintiff a decree, but on appeal the District Judge reversed the decree of the District Munsif.

Plaintiff appealed.

*Ramachandra Rau Sahib* and *Kasturi Rangayyangar*, for appellant.

*Desikachariar*, for respondents.

## JUDGMENT.

There is no provision in Act II of 1864 which enables a Collector to revive a sale which he has once cancelled. In the present case the Head Assistant Collector cancelled the sale on the 2nd November 1883. He had no power to revive the sale nearly a year afterwards as he purports to have done. The issue of the certificate was, therefore, ineffectual to create any title in the plaintiff.

We dismiss this second appeal with costs.

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* Second Appeal No. 844 of 1895.

20 M. 254.

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## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Davies.*

ARUMUGAM PILLAI (*Defendant*), *Appellant* v. ARUNACHALLAM PILLAI (*Plaintiff*), *Respondent*.* [5th January, 1897.]

*Registration of wills after death of testator—Inquiry by registering officer into disability of testator—Indian Registraton Act, Sections* 35. 40, 41.

**The procedure prescribed by Section 35 of the Indian Registration Act is not applicable to the registration of wills which, under Section 40 of that Act, are presented for registration after the death of the testator by persons claiming under them.**

SECOND appeal against the decree of E. J. Sewell, Acting District Judge of Tanjore, in appeal suit No. 211 of 1894, confirming the decree of C. Venkobachariar, Subordinate Judge of Tanjore, in original suit No. 30 of 1893.

The plaintiff, the maternal uncle of one Manikam Pillai, deceased, applied to have a document purporting to be the will of Manikam Pillai registered. The Sub-Registrar refused registration, and on appeal the Registrar confirmed the decision of the Sub-Registrar. Thereupon the plaintiff filed this suit under [255] Section 77 of the Indian Registration Act, making the divided paternal uncle of Manikam Pillai the defendant in the suit.

The defendant contended that the will was not genuine, that Manikam was a minor on the alleged date of its execution, and therefore not competent to make the will, and that moreover he was unconscious and not in a fit state of mind to execute any testamentary disposition.

The following were the issues framed in this suit for decision :—

Whether or not the deceased Manikam Pillai was a major at the time of the execution of the alleged will.

Whether the will is genuine and was duly executed by the deceased Manikam Pillai.

Whether or not suit is barred by limitation.

Whether the plaintiff is entitled to have the will registered.

On all these issues the Subordinate Judge found for the plaintiff and directed the registration of the document.

On appeal the District Judge found on the second issue that the will was duly executed by Manikam Pillai. On the first issue, as to whether the testator was a minor at the time of the execution of the will, the District Judge said : "I consider, therefore, that a Registering officer is not "permitted by the Registration Act to refuse registry of a will when "presented by any person other than the testator, on the ground of the "minority of the deceased testator when he executed the will," and did not allow the appellant to argue whether in fact Manikam Pillai was a minor at the time when the will was executed.

The question of limitation under the third issue was raised upon the following facts :—

The District Registrar's order of refusal was made on 3rd November 1892. The plaintiff filed his suit before the Tiruvadi District Munsif on

* Second Appeal No. 1067 of 1895.

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2nd December within thirty days of the order. The District Munsif came after some months to the conclusion that the suit was not within his pecuniary jurisdiction and returned it to be filed in the Subordinate Judge's Court. That order is dated 21st July 1893. The suit was filed before the Subordinate Judge on the same day. With regard to this the District Judge said: I consider therefore that the suit was instituted when "the plaint was presented to the District Munsif of Tiruvadi on 2nd "December 1892, and, therefore, is not barred by limitation." In the result he confirmed the decree of the Subordinate Judge.

[256] Defendant appealed.

*Sivasami Ayyar*, for appellant.

*Pattabhirama Ayyar*, for respondent.

## JUDGMENT.

The bar of limitation could not avail if the plaint was originally presented in the proper Court, and we consider that it was so presented in that the Munsif had jurisdiction. On this ground, but not on the grounds given by the Judge, we hold that the suit was not time-barred.

With regard to the question whether the alleged minority of the testator was a valid reason for the Registrar refusing registration, we agree in the conclusion arrived at by the Judge. A clear distinction is made in Section 41 of the Registration Act between the case of the will presented by the testator himself, and that of a will presented by any other person entitled to do so. In the former case the rules laid down in Section 35 are made applicable, but in the latter case special rules are given. In these special rules no provision is made for an enquiry as to the testator's minority or sanity, for which enquiry provision is made in the rules in Section 35. It would not be reasonable to hold that the special rules (*a*), (*b*) and (*c*) of Section 41 are merely supplemental to the rules in Section 35, because at least in one instance the same rule in substance appears in both sections. The second appeal, therefore, fails and is dismissed with costs.

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**20 M. 256 (P.C.) = 24 I.A. 118 = 7 Sar. P.C.J. 185.**

## PRIVY COUNCIL.

PRESENT:

*Lords Watson, Hobhouse and Davey and Sir Richard Couch.*

[*On appeal from the High Court at Madras.*]

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SRI RAJA VIRAVARA THODHRAMAL RAJYA LAKHSHMI DEVI GARU (*Defendant*) v. SRI RAJA VIRAVARA THODHRAMAL SURYA NARAYANA DHATRAZU BAHADUR GARU (*Plaintiff*).
[4th and 5th March and 7th April, 1897.]

*Hindu law—Impartibility not established—Possession of one member of joint family at a time—What constitutes partition.*

A zemindari granted by the Government in 1803 to a Hindu descended in his family, possession being held by one member at a time. The estate, however, [257] was not impartible. But whether it was, or was not, impartible was adjudged immaterial to the question raised on this appeal.

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The last zemindar having died without issue in 1888, his widow was in possession when this suit was brought by a male collateral descended from a great-grandfather common to him and to the last zemindar. The plaintiff claimed to establish his right as member of an undivided family holding joint property against the widow who alleged that her husband had been sole proprietor. In proof of this she relied on certain arrangements as having constituted partition, *viz.*, that in 1816, two brothers, then heirs, agreed that the elder should hold possession, and that the younger should accept a village, appropriated to him for maintenance in satisfaction of his claim to inherit; again, that in 1866, the fourth zemindar compromised a suit brought against him by his sister for her inheritance, on payment of a stipend to her, having already, on the claim of his brother, granted to him two villages of the estate ; and, by the compromise, this was made conditional on the sister's claim being settled : again, that in 1871, the fourth zemindar having died pending a suit brought against him to establish the fact of an adoption by him, an arrangement was made for the maintenance of his daughter, and two widows, who survived him, the previous grant for maintenance of his brother holding good, the adoption being admitted, and the suit compromised:

*Held*, that there was nothing in the above which was inconsistent with the zemindari remaining part of the common family property ; and that the course the inheritance had not been altered :

*Held*, also, that the claimant was not precluded by the family compromise of 1871, or in any way, from maintaining the suit ; and that it was not barred by limitation.

[**R.**, 9 Ind. Cas. 849 (855) = (1911) 1 M.W.N. 281 ; 15 Ind. Cas. 17 (21) = 23 M.L.J. 168 = 12 M.L.T. 293 ; 15 Ind. Cas. 412 (416) = 23 M.L.J. 79 = 12 M.L.T. 245 (250) = (1912) M.W.N. 790 (796) ; 10 O.C. 367 (373) ; 11 O.C. 381 (388); **Cons.**, 22 M. 538 (548); **D.**, 31 C. 111 = 7 C.W.N. 688.]

APPEAL from a decree (2nd March 1893) of the High Court, which affirmed a decree (19th December 1890) of the District Judge of Vizagapatam.

The plaintiff, now respondent, was Surya Narayana, great-grandson of the third zemindar of the Belgam Zemindari. The first defendant, now first appellant, Sri Raja Lakhshmi Devi Garu, was widow of the last zemindar, who died in 1888, and who was also great-grandson of the third zemindar. A second defendant, who did not appear on this appeal, was the plaintiff's younger brother Sundara Narayana Dhatrazu. The Collector of Vizagapatam, Agent to the Court of Wards, and guardian of the first defendant, had been made a defendant, by order of 10th September 1889.

The zemindari had been granted by the Government on the 21st October 1803, by a *sanad i milkeut istimrar*, or deed of permanent property, following Regulation XXV of 1802.

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[258] The following table shows the succession to the zemindari :—

- Soma Sundara Narayana, Lessee of Belgam in 1796; First Istimrar Zemindar, 1803, died December 1814.
  - Dhananjaya, Second Zemindar, died without male issue November 1849.
  - Visvambhara, Third Zemindar, died July 1865.
    - Narayana Ramachandra, Fourth Zemindar, died March 1871.
      - Rajya Lakshmi Devi.
    - Janardhana, died May 1885.
      - Sivan Narayana, adopted by Narayana Ramachandra, Fifth Zemindar, died March 1882.
        - Dhananjaya, Sixth Zemindar, M. Rajya Lakhshmi Devi, First Defendant, died without issue October 1888.
        - Visvambhara, said to be adopted into another family.
      - Chandrasekhara, died March 1868.
        - Surya Narayana, Plaintiff.
        - Sundara Narayaua, Second Defendant.
      - Bahavan Narayana, died November 1884.
        - Narayana Ramachandra, died unmarried January 1889.

The main question on this appeal was whether the zemindari was the joint family property in the hands of the sixth zemindari the widow's husband; or had ceased to be joint family property by reason of certain acts, which were alleged by the defence to have had the effect of partition, and to have altered the course of descent, so that the zemindari had become the separate property of her husband, the last owner. If that was the result of those acts, the widow would have become entitled to her widow's estate in the zemindari. The facts appear in their Lordships' judgment. The following were the principal transactions alleged to have had the effect of partition :—

In February 1816, Visvambhara, second son of the first zemindar, executed two deeds of receipt and acquittance (Pharikati) (the particulars of which are set forth in the judgment on this appeal) on receiving a grant of a village, part of the Belgam Zemindari from his elder brother Dhananjaya. In 1866, [259] Ramachandra the fourth zemindar, granted to his only brother, Janardhana, two villages of the zemindari as Taoji, or gift for maintenance. Against this Ramachandra, a suit was brought by Sivan Narayana, alleging himself to have been adopted by Ramachandra, who did not admit the adoption, and who died in 1871, while the suit was pending. Janardhana, the natural father of Sivan Narayana, and Ramachandra's two widows with his daughter, who survived him, were made

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parties to the suit, which was then compromised by razinamas, dated the 6th September 1871. In those documents reference was made to the previous grant of Taoji to Janardhana, and a family agreement was made that Sivan Narayana should succeed as adopted son of Ramachandra, Janardhana, continuing to hold his two villages; and provision being made for the women of the senior branch.

The plaint (25th April 1889) alleged that the zamindari, recently granted, was partible among the heirs of the grantee, and that the plaintiff and his brother Sundara Narayan were entitled to the estate in equal shares, the defendant widow being only entitled to maintenance. The prayer was that one-half might be allotted to the plaintiff in severalty, excluding the villages granted in 1866, with one-half of the moveables, and with mesne profits.

The Court of Wards filed the widow's written statement ; in effect raising questions, the subject of the issues, whether the zamindari was partible or impartible, whether there had been partition, whether the estate had been acquired by the last owner himself, whether the plaintiff was estopped, by the acts of those through whom he claimed, from maintaining this suit, and whether it was barred by limitation.

The District Judge decreed in favour of the plaintiff that he was entitled to one-half of the property left by the late zamindar including the Zamindari of Belgam. In his judgment the zamindari was partible. The family was not ancient : the grant in 1796 was merely of a life estate. The grant in 1803 was not made in any manner which carried with it an implication that it was to be impartible. The duration of the family was not sufficient to give rise to a custom over-riding the ordinary law ; and the mode in which the parties had dealt with each other was consistent with the estate being that of an ordinary undivided family under Mitakshara law, even though that family might have entertained the mistaken belief that the estate descended to a single heir.

**[260]** The District Judge held that the property was not the 'self-acquisition' of any one who came after the common ancestor, Visvambhara. It had always gone in the direct line of primogeniture, and there never had been any loss of the estate which could be followed by the acquirement of any one of the successive zamindars.

Also, he found that there had never been any partition. There had not been in the transactions of different years, which had been alleged on behalf of the widow to amount to partition, any intention whatever to affect the undivided status of the family. He held, moreover, that there was no estoppel, in consequence of the execution of the razinamas of September 1871, to bar the plaintiff's maintaining this suit. The agreement of that year recognised the adoption of Sivan Narayana, and his right to take the place of his adoptive father, while provisions for the maintenance of the females of the senior branch and the males of the junior branch, were, at the same time, settled. Nothing was arranged as to the order of succession on the extinction of the senior branch, if it should occur, nor was any arrangement made for that succession in a manner contrary to the ordinary rules of inheritance of the Hindu law. This latter would have been invalid, and would not have been binding on the plaintiff, nor would it have affected his right to claim, as a member of a joint family, his share of the undivided estate.

As to limitation, the District Judge held that no question could arise under Article 127 of Act XV of 1877. The plaintiff's branch, though existing, had not been shown to have had any right of possession until

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the property vested in 1888 on the death of the late zamindar in his collateral relations as his heirs. Till then, there was no exclusion of the plaintiff's branch, and not till then was there any possession held by another adversely to his branch.

The above necessarily cut away the ground that the widow could hold the zamindari against the plaintiff and his brother. The case put by the defendant's counsel was that the zamindari itself had not been divided, being impartible, but that the members of the family having become divided as to living and as to property and having agreed to a decree of separation in 1871, their status had become that of divided members of the family, and that this status must govern the right of succession to the zamindari, even if the latter was undivided.

**[261]** This argument the Judge considered to fail, even if the facts were as alleged, on the ground that property, which was designedly excluded from a partition, remained joint, and was governed by the rule of succession which excluded a widow while undivided males were in existence.

Against this decision the Collector, as guardian of the widow, defendant, appealed to the High Court, which dismissed the appeal.

The High Court (PARKER and SHEPHARD, JJ.) considered, as to the alleged impartibility, that there had been no indication of an intention to impress that character on the estate granted in 1803. On the contrary there was clear indication of an intention the other way. The grant was to an individual not connected with the family of the original zamindar, and was not made as a restoration of an original estate. It was true that, as often as there had been a devolution of the estate, the eldest son, or in absence of a son, the brother, of the last holder, had assumed the position of zamindar. The estate had, no doubt, been treated by the family as if it had been impartible, and as if all that the junior branch could claim was a right of suitable maintenance. This state of things had continued for about seventy years. In the opinion of the Judges, in the case of a family of comparatively modern origin, evidence of conduct extending over such a short period was wholly inadequate to prove a special custom. The alleged usage would not be from ancient times. They referred to *Amrithnath Chowdhry* v. *Goureenath Chowdhry* (1) and *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (2). They considered it a matter beyond dispute that the zamindari was not impartible and that there was no such special custom, though the members of the family had agreed in treating it as impartible.

That being so, only two defences were raised, *viz.*, renunciation under the compromise of 1871 and limitation. As to the first, the Judges held that no question beyond that of the present enjoyment of the zamindari had been raised by the parties, and that Janardhana had had shown no intention to separate himself and his descendants from the right of succeeding to the zamindari. As **[262]** to the second point, the bar by limitation, the Court considered that there never had been, till 1888, any holding possession adversely to the right which was claimed in this suit, that right being to succeed in default of direct male heirs of Ramachandra. Thus no question of limitation could arise.

The defendant widow having appealed from the High Court's decree, affirming the decree of the first Court.

(1) 13 M. I. A. 542. (2) 14 M. I. A. 570.

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Mr. *A. Cohen*, Q. C., and Mr. *J.H.A. Branson*, for the appellant argued that the judgments in the Courts below had not given due weight to the transactions of 1816, of 1865—66, and of 1871—72. The result of those family arrangements had been a partition, effective to render Dhananjaya, the sixth zamindar, the inheritor of a separate zamindari ; and in this his widow had obtained her widow's estate for life. Whilst the family had acted in the belief that the family estate was impartible and must remain in the hands of the zamindar for the time being, their arrangements had been such that the senior branch, on the one side, had given, and the junior branch, on the other side, had accepted, satisfaction for the separate possession of the zamindari being permanently made over to the senior branch. This had constituted partition. The evidence had shown that Ramachandra and Janardhana having lived separate, had separated from each other in estate at the time of Sivan Narayana's suit of 1870—71. The plaintiff was estopped by the acquittance and discharge given. The compromise should be regarded. Moreover, this claim had originally been based, as shown by the plaint, on the case that the Zamindari of Belgam was an ordinary partible estate. But both the Courts below had found that, although it was not impartible, it had been dealt with by the family as if it had been impartible. The compromise had been made on this footing. There had been a renunciation by the junior branch, and an acquisition by Ramachandra which might be considered to give the property the character of acquired estate. Reference was made, as to what constituted partition, to *Appovier* v. *Rama Subba Aiyan* (1), *Sri Raja Jaganadha* v. *Sri Raja Pedda Pukir* (2), *Rai Raghunathi Bali* v. *Rai Maharaj Bali* (3), *Periasami* v. *Periasami* (4), *Malikarjuna Prasada* **[263]** *Naidu* v. *Durga Prasada Naidu* (5), *Thakur Darriao Singh* v. *Thakur Darri Singh* (6), *Bhaiya Ardawan Singh* v. *Udey Pratab Singh* (7). Reliance was placed on limitation. It was argued that Article 127, Schedule II of the Limitation Act XV of 1877, applied on the alleged exclusion of those through whom the plaintiff claimed for more than twelve years before his demand. Reference was made to *Ramachandra Narayan Singh* v. *Narain Mahadev* (8).

Mr. *J. D. Mayne*, for the respondent contended that there had been no evidence given of partition of the zamindari. As regarded the present claim of a coparcener in a joint family estate against the widow of the last possessor, it was not essential to have determined whether the estate was partible or impartible. The evidence had, however, shown it to be partible. The estate had, never been partitioned, and the right of the present claimant had never been extinguished. There had been no renunciation of right, precluding the claim now made, nor any break in the undivided rights of the family coparceners. Thus there was no reason for considering the estate to be the separate estate of the last possessor, nor any reason for considering it to have been his 'self-acquired property.' Neither by estoppel nor by limitation was this suit barred. He referred to the judgment in *Appovier* v. *Rama Subbu Aiyan* (1), *Sri Raja Jaganadha* v. *Sri Raja Pedda Pukir* (2), and *Bhaiya Ardawan Singh* v. *Udey Pratab Singh* (7).

Mr. *J. H. A. Branson* replied.

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(1) 11 M.I.A. 75. (2) 4 M. 371. (3) 12 I.A. 112 = 11 C. 777.
(4) 5 I.A. 61 = *Sivagnana Tevar* v. *Periasami*, 1 M. 312.
(5) 17 M. 362. (6) 1 I.A. 1. (7) 23 I.A. 64 = 23 C. 838.
(8) 11 B. 216.

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## JUDGMENT.

Afterwards on 7th April, their Lordships' judgment was delivered by LORD DAVEY :—This is an appeal against a decree of the High Court of Madras affirming a previous decree of the District Court of Vizagapatam. The appellant, who was defendant in the action, is the widow of the late Zamindar of Belgam who died on the 29th October 1888 without leaving any issue and intestate. She claims to be entitled to a widow's estate in the entire zamindari. The respondent (plaintiff in the action) claims to be entitled in possession to one moiety of the zamindari on the ground that the zamindari was part of the joint property of his and the late zamindar's family and [264] he alleges that the zamindari being partible in title his brother Surandara Narayana (who was made a defendant in the action, but is not a party to this appeal) is entitled to possession of the other moiety. On the other hand the widow and appellant contends that the zamindari was impartible in title and that owing to certain family arrangements, it had become the separate property of her late husband.

The Zamindari of Belgam was originally created by a sunnud, dated 21st October 1803, granted by the Government to Somasundara Narayana (the first zemindar). The sunnud itself has been lost, but the contents of it sufficiently appear from the kabuliat or counterpart executed by the zamindar and dated 28th April 1804 which was put in evidence. It appears from this document to have been in a form which is stated to have been usual in grants by the Madras Government of that period. It conferred on the zamindar liberty to transfer by sale gift or otherwise his proprietary right in the whole or any part of the zamindari and granted the estate to him his heirs, successors and assigns at the permanent assesment therein named. It would seem from the arrangements made in the family that the zamindari was regarded as impartible. But whether that be so or not it has been now decided in the case of *Venkata* v. *Narayya* (1) on the construction of a sunnud of similar form and granted about the same date that the zamindari thereby created was not impartible or descendible otherwise than according to the ordinary Hindu law. It must be taken therefore that the Zamindari of Belgam was not impartible whatever the parties may have thought and the misapprehension of the parties could not make it so or alter the legal course of descent. It will however be found that as between the appellant and the respondent the question whether the zamindari is partible or not is of no importance. Even if impartible it may still be part of the common family property and descendible as such in which case the widow's estate of the appellant would be excluded. The real question therefore is whether it has ceased to be part of the joint property of the family of the first zamindar or (in other words) whether there has been an effectual partition so as to alter the course of descent.

Somasundara Narayana, the grantee and first zamindar, died in the year 1814, leaving two sons Dhananjaya No. 1 and Visvam-[265] bhara No. 1. Dhananjaya was allowed by his brother to succeed to the estate and became second zamindar. Two documents, dated the 16th and the 18th Febuary 1816, were executed on this occasion and were the first transaction relied on by the appellant in proof of the separation of estate or partition which she alleged had taken place. The first document was a ' pharikat sunnud ' given by Visvambhara in the following terms :—

(1) 7 I. A. 38.

"As we have both equally divided and taken all the cash, jewels and "other (property) in the palace to which both of us are entitled, I bind "myself not to claim (anything) from you at any time. I shall reside in "the village of Addapusila which you were pleased to give me for my "maintenance and act according to your wishes."

By the second document (also called a 'pharikat sunnud') Visvambhara stated:—

"I or my heirs shall not at any time make any claims against you or "your heirs in respect of property moveable or immoveable, or in respect "of (any) transaction. As our father put you in possession of the "Belgam Zamindari, I or my heirs shall not make any claim against you "or your heirs in respect of the said zamindari."

Their Lordships do not find any sufficient evidence in the arrangement made by these documents of an intention to take the estate out of the category of joint or common family property so as to make it descendible otherwise than according to the rules of law applicable to such property. The arrangement was quite consistent with the continuance of that legal character of the property. The elder brother was to enjoy the possession of the family estate, and the younger brother accepted the appropriated village for maintenance in satisfaction of such rights as conceived he was entitled to. In the opinion of their Lordships it was nothing more in substance than an arrangement for the mode of enjoyment of the family property which did not alter the course of descent.

The second zamindar died in 1849, leaving two widows and one daughter Ratna Mani Amma but no son. At this time the estate was in the hands of a mortgagee and remained so during Visvambhara's life. He died in 1865, leaving two sons Ramachandra and Janardhana. A suit was commenced by Ratna Mani Amma (her father's widow being then dead) to recover the zamindari from Ramachandra. This suit ended in a compromise by **[266]** which the plaintiff withdrew her claim to the estate on condition of Ramachandra paying her Rs. 500 a year. Ramachandra had, already by a kararnama, dated 13th October 1866, on the application of his brother Janardhana and with a view to enable him and his family to live decently, granted to him as *towji* the villages of Addapusila and Vuddavolu conditional on Ratna Mani's suit being settled in the manner mentioned. Ramachandra seems to have recovered possession of the estate from the mortgagees and succeeded as fourth zamindar. This transaction does not tend to support the case of the present appellant.

Ramachandra having no male issue adopted Sivan Narayana, the eldest son of Janardhana, but afterwards attempted to repudiate the adoption. In 1870 a suit was commenced by Sivan Narayana against Ramachandra to establish the adoption and praying for a decree establishing his title to the zamindari after the defendant's death. During the pendency of the suit Ramachandra died without male issue, but leaving one daughter and thereupon the suit was revived against Janardhana and Ramachandra's two widows and his daughter. Their Lordships observe that these persons were the only persons then interested in contesting the adoption of Sivan Narayana and they must assume that they were made defendants to the suit for the purpose of establishing the adoption against them. The suit was compromised as regards Janardhana and one of the widows (named as second defendant) on the terms contained in a razinama, dated 6th September 1871, and as regards the other widow on behalf of herself and her infant daughter in another razinama.

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of the 16th September 1871. These are the documents which are chiefly relied on by the present appellant in support of her case.

By this compromise Janardhana agreed that the plaintiff was the adopted son of his elder brother, that the right to the zamindari should pass to the plaintiff and that Janardhana should be enjoying or continue to enjoy (for the words are translated both ways) the villages of Vuddavolu and Addapusila attached to the zamindari which had been in his possession and enjoyment in accordance with the kararnama executed in his favour by his late elder brother, and he also agreed to the provision to be made for Ramachandra's widows and daughter. The other defendants agreed to the plaintiff being the adopted son of the second defendant and her late husband and to the right of the zamindari being the plaintiff's. [267] Provisions were made for the two widows during their lives out of lands attached to the zamindari. It was arranged that Ramachandra's daughter should be married to Sivan Narayana's son, or in default provision should be made for her out of lands of the zamindari—and there were other provisions for the benefit of the widows.

The terms of the compromise seem to have been carried out and Sivan Narayana as adopted son of Ramachandra succeeded to the zamindari. He died in March 1882 and was succeeded by his son Dhananjaya (2) who died on the 29th October 1888 intestate, leaving the appellant his only widow and no issue.

The respondent is one of the two sons of Chandrasekhara (deceased) the second son of Janardhana, and he and his brother are his only two surviving grandsons. It is alleged and seems to have been admitted in the case that Visvambhara (2), a brother of the late Zamindar Dhananjaya (2), had been adopted into another family and was excluded from any share in the property of his natural father's family, and the proceedings in the suit were conducted on that assumption. Their Lordships will only point out that if any mistake has been made with respect to this fact, nothing that is decided in this suit will affect his interest (if any) in the zamindari. Visvambhara applied to be made a party to the suit, but his petition was refused on other grounds, and no evidence was gone into as to his adoption into another family.

The present suit was commenced by the respondent on the 25th April 1889 against the appellant, the respondent's brother, and the Court of Wards as guardian of the appellant. The plaint ignores the adoption of Sivan Narayana and proceeds on the assumption that he succeeded to the estate with the permission of his natural father Janardhana and his natural brothers and managed the estate on behalf of himself and the other members of the family. It alleges that the estate is partible and is owned and enjoyed by the family of the plaintiff. The prayer is that, excluding the villages of Vuddavolu and Addapusila, the zamindari be divided so as to give the respondent his half share, and the same recovered from the appellant. The defence was in substance (1) that the zamindari is impartible, (2) that the respondent was estopped by the family compromise of 1871 from maintaining the suit, and (3) that the suit is barred by the Law of Limitations. The validity of the adoption of Sivan Narayana is not now in dispute.

[268] On the first point their Lordships have already expressed their opinion and have pointed out that as between the appellant and respondent the question is immaterial. It only arises as between the respondent and his brother who is not a party to this appeal. The District Court decreed the respondent possession of half of that part of

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the zamindari which is within the local jurisdiction of the Court, and that was all that the plaint asked for.

On the second point their Lordships agree with the Courts below that the course of descent of the zamindari was not altered by the compromise of 1871, and that the widow is not entitled to succeed to a widow's estate as heir of the late zamindar. The only question raised in the litigation of 1870 was as to the fact of Sivan Narayana's adoption by Ramachandra, and it does not appear that any other contention was raised by Janardhana when he was made a party to the suit or was in the contemplation of the parties. They may (as has been suggested) have been under the erroneous impression that the zamindari was impartible, but there was nothing in the compromise inconsistent with the zamindari (even if impartible) remaining part of the common family property. The two villages were originally granted by Ramachandra to Janardhana as *towji* only and in order to provide a decent maintenance for him and his family, and in 1871 it was agreed that Janardhana should continue to enjoy the villages in accordance with Ramachandra's grant. It is said that Janardhana and his family have dealt with these villages in a manner inconsistent with their holding them for their maintenance only. Their Lordships express no opinion on the point, but even if they have exceeded their rights that will not alter the effect of what was done by the agreement of 1871. It is impossible to treat that agreement as a deed of partition by which the zamindari was converted into the separate or acquired property of Sivan Narayana.

Their Lordships also agree with the Courts below that the suit is not barred by the Law of Limitations. As between the appellant and the respondent the suit is not one for partition. The claim of the latter is not to hold jointly with the appellant, but to succeed adversely to her as one of the right heirs on the death of the last zamindar. There has been no denial of the title of Janardhana and his family or exclusion of them from the estate. On the contrary the possession has been under and in accordance with the agreement of 1871 by which a provision was made for the junior branch.

**[269]** Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed. The appellant will pay to the respondent his costs of the appeal.

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## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

MAHADEVI AND ANOTHER (*Defendants Nos.* 1 *and* 2) *Appellants v.* NEELAMANI (*Plaintiff*) *Respondent.**
[19th November, 1896.]

*Hindu Law—Po-Brahman—Alienation by widow for religious purposes*—'Res judicata' —*Decision on title in proceedings under Land Acquisition Act*, 1870.

When a Po-Brahman receives a salary for the performance of his duties, a gift to him by the widow of the person whose exequial rites he has been appointed to perform to reward him for having performed any of those exequial rites is not a gift binding on the reversioners.

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* Appeal No. 148 of 1895.

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In proceedings under the Land Acquisition Act, 1870, to apportion the compensation payable, a decision by the Judge on a question of title does not operate as *res judicata* between the parties to those proceedings.

[F., 32 A. 484 = 7 A.L.J. 425 = 6 Ind. Cas. 127; R., 34 C. 446 = 11 C.W.N. 525; 13 C.L.J. 547 = 15 C. W.N. 1021 (1024) = 10 Ind. Cas. 434 (436); D., 29 M. 173.]

APPEAL against the decree of J. P. Fiddian, District Judge of Ganjam, in original suit No. 9 of 1894.

The plaintiff brought this suit to recover possession of a village with mesne profits. The village in question had formed part of the estate of the late zemindar of half of Tekkali taluk and had been given to the plaintiff by the late zemindar's widow. The first and second defendants were the daughters of the zamindar and, having, on the death of his widow, succeeded to his estate, had obtained possession of the village in question, which till then had been in possession of the plaintiff. The other defendants were the ryots of the village.

The circumstances under which the gift had been made were as follows:—In accordance with a custom prevailing among the Oriya zamindars, the late zamindar had appointed the plaintiff Po-Brahman (son Brahman) to perform his exequial rites. After [270] the death of the zemindar without male issue his widow succeeded to his estate, and requested the plaintiff to offer the *pinda* to the zamindar at Gaya. This the plaintiff did, and some seven or eight years after he had done so, the widow on the 10th August 1874 executed in his favour the deed of gift in question. The motive for the gift was stated in the deed to be the fact that the plaintiff, having been appointed Po-Brahman by the late zamindar, had, in accordance with the custom prevailing in the late zamindar's family, "performed just like a son *pindathanam* and other ceremonies at Sri Gaya" in order that the late zamindar might attain salvation. The plaintiff, however, did not allege that he had performed any ceremonies at Gaya except the *pindathanam*.

The deed was attested by the first and second defendants, but under circumstances which their Lordships held did not create an estoppel.

The first and second defendauts pleaded that the gift did not bind them. Their contention on this point as set out in their written statement was as follows:—

"The plaintiff was appointed (not adopted) to the office of Po-Brah-"man by the late Sri Gopinadha Devi Garu, and he performed the duties "thereof in consideration of receiving the perquisites attached thereto.

"The offering of *pinda* is not outside the duties of the said office, nor "is it an indispensable ceremony. It is rather a spiritual luxury than a "spiritual necessity. The plaintiff made the pilgrimage to Gaya and other "holy places at the expense of the late Sri Radika Patta Mahadevi Garu "as much on his own as on her account and took advantage of the occa-"sion to perform the said *pindathanam* and received the usual dues for it.

"There was no agreement that he should be given a village in con-"sideration of making the said *pindathanam*. It is not in any case such "an act as deserved to be remunerated by a free and absolute gift of a "valuable village like the plaint village, which is one of the best villages "in the defendants' *Khandam* of the Tekkali taluk, and which yields an "income of over Rs. 1,000 per annum, and which is worth more than "Rs. 20,000.

"The alienation is not, therefore, for a family necessity and is not "such as, when made by a widow with limited powers, would bind the "reversioners."

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**[271]** At the trial the first and second defendants adduced evidence to the effect that it was usual to give a Po-Brahman a salary and certain mamools and perquisites, and that the plaintiff as Po-Brahman had received Rs. 2 per mensem and 2 graces of paddy per annum.

The plaintiff also relied on a decision of the District Judge in proceedings under the Land Acquisition Act X of 1870. In 1891 about 14 acres of land in the village in question were compulsorily acquired for the East Coast Railway. The Collector inquired into the matter under Section 11 of the Act, and under Section 15 of the Act referred the case to the District Judge "to determine the amount of compensation to be "paid to the person interested." The District Judge in giving judgment said: "Before fixing the amount it is necessary to decide who is entitled "to it, in order that the owner may adduce evidence as to its value." And he framed the following issue :—

"How far the deed of gift (Exhibit A) by the Mahadevi (second "claimant) to the first claimant is valid as against the reversioners "(daughters), claimants 3, 4, and 5.

He then found that the gift was valid and that the plaintiff was entitled to the compensation, the amount of which he then proceeded to determine. The only parties who appeared before the Judge in these proceedings were the plaintiff in the present suit, who claimed the whole of the compensation to be awarded; the widow of the late zemindar who admitted the validity of the deed under which plaintiff claimed and requested that the compensation should be paid to the plaintiff; and the eldest sister of the first and second defendants, who denied the validity of the gift and contended that the compensation should be paid to the widow on behalf of the estate. Though the first and second defendants did not appear at these proceedings, the following notice was, prior to the proceedings, served on the agent of the first defendant :—

"The fourth claimant Muktamala Patta Mahadevi of Tekkali is "hereby informed that the 1st day of February 1893 has been fixed as "the date of hearing for the purpose of settling the disputes in respect of "the amount of compensation fixed by the officer making reference in the "matter of 14 acres 25 cents of wet and dry lands in Vallabharoyipadu "village, which belong to you and which were taken possession of by Government for the East Coast Railway. You should, therefore, appear on the "said date either in person or by a Vakil with the evidence and documents "**[272]** you possess and represent to the Court the amount of compensation you claim for the right you possess in respect of the said land and "other points relating thereto."

In the present suit, the District Judge found that the alienation had not been made for such a purpose as to bind the reversioners, *i.e.*, it was not made to secure the offering of the pindam, and it was only made as a reward for services past; and as to the question of *res judicata*, he found that the first and second defendants had due notice of the enquiry into their title and must be held to be bound by the decision in the proceedings under the Land Acquisition Act of 1870.

First and second defendants appealed.

*Pattabhirama Ayyar*, for appellants.

*Bhashyam Ayyangar* and *Seshachariar*, for respondent.

## JUDGMENT.

We agree with the Judge that there was no such necessity for the gift by the widow as would be binding on the reversioners. As the

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plaintiff was already in receipt of a regular income as Po-Brahman, and the ceremonies performed by him at Gaya were performed in the same capacity, and many years before the gift, there was no justification for the grant which was purely voluntary.

The next finding of the Judge is that the question of title in regard to the plaint property is *res judicata* by reason of the decision under Section 39 of the Land Acquisition Act of 1870. Assuming that the appellants were made parties to the proceedings under that section, though the question is doubtful owing to the faulty character of the notice (Exhibit III) served on the first appellant, we do not think that the finding in the Land Acquisition case in favour of the validity of the plaint gift operates as *res judicata* in this case, inasmuch as the litigation under that Act is a special form of proceeding confined to the determination of the amount of compensation due and the persons to whom it should be paid. Such a proceeding cannot be treated as a 'suit' within the meaning of Section 13 of the Code of Civil Procedure, so as to render a decision come to therein binding when the same question arises in what is strictly a suit. Further, for the reasons stated by Pontifex, J., in *Nobodeep Chunder Chowdhry* v. *Brojendra Lall Roy* (1), we should not be justified in holding, **[273]** on even general grounds, that an adjudication under the Land Acquisition Act should be held to be conclusive in disputes connected with property other than that to which the enquiry under that Act related.

As to the estoppel which the Judge has also found in plaintiff's favour, we must again differ from him. We find, on the statements of the appellants which have not been contradicted, that they put their signatures to the deed as attesting witnesses under pressure. There is no evidence to show that they were aware of the exact terms of the document or that, in attesting the document, they were doing anything likely to affect their reversionary rights. There is absolutely nothing to indicate that they were willing or intended to part with those rights. Considering that they were *purdanashin* and young women at the time and that the plaintiff was the confidential manager of the affairs of their mother, under whose protection they were living, it lay on the plaintiff to prove that they acted with full knowledge and with independent advice, but the plaintiff has not even attempted to prove this. In these circumstances, we could not have held the appellants bound by the deed of gift, even had they been the executing parties. In no view can their mere attestation of the document amount to an estoppel in a case such as this, where there has been no alteration of plaintiff's position in consequence of their act.

We are, therefore, of opinion that the plaintiff has failed to establish the validity of the gift upon which he sues.

We must accordingly, reverse the decree of the Lower Court and dismiss the plaintiff's suit with costs throughout.

[REPORTER'S NOTE.—Though the case of *Ram Chunder Singh* v. *Madho Kumari* (2) does not appear to have been relied on in the argument for the respondents, it was considered by their Lordships before delivering judgment. The distinction between that case and the present, it is suggested, is that, in the present case, the decision which was held to be *res judicata* was made on a reference by the Collector under Section 15 of Act X of 1870, and was, therefore, made in a proceeding under the Act. In the former case, however, the Judge who gave the decision that was held to be *res judcata* does not appear to have been proceeding under the Act: for both from the report in the Lower Court (3) and from the report in the Privy Council (see at p. 492) it is gathered

(1) 7 C. 406. (2) 12 C. 484. (3) 9 C. 411 (412),

that the Judge was proceeding not on a reference from the Collector under Section 15 of the Act nor on a reference under Section 38 of the Act (which are the only ways in which the question of apportionment and a question of title as incident thereto can come before a Judge under the Act), but in a suit instituted by the plaintiff independently of the Act.]

20 M. 274=7 M.L.J. 87.

## [274] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

ALANGARAN CHETTI AND ANOTHER (*Defendants Nos.* 1 *and* 2), *Appellants v.* LAKSHMANAN CHETTI AND OTHERS (*Plaintiff and Defendants Nos.* 3 *and* 4), *Respondents.**
[7th December, 1896.]

*Mortgage—Transfer of Property Act, Section* 101*—Renewal of mortgage—Priority over subsequent incumbrance.*

Where a mortgagee, subsequently to the execution of the mortgage deed, takes another mortgage in renewal of the former deed, he has priority over incumbrances subsequent to the first deed.

[Not appr., 7 A L J. 984=7 Ind. Cas. 468 (469); R., 12 C.P.L.R. 70.]

APPEAL against the decree of P. Narayanasami Ayyar, Subordinate Judge of Madura (West), in original suit No. 10 of 1893.

The plaintiff sued on a simple mortgage deed (Exhibit A), executed in favour of one Narayana Chetti and the first defendant by the third defendant. The deed was dated 16th October 1879, and after reciting that certain monies were due on a prior mortgage deed (Exhibit E, dated 28th March 1871), executed by the third defendant in favour of the deceased undivided brother of Narayanan Chetti and in favour of the first defendant, provided for the payment of the monies due under the former deed with interest, and to secure the payment mortgaged certain immoveable properties of the third defendant.

After the execution of the deed of the 28th March 1871, but before the execution of the deed now sued on, the first defendant on different dates made further advances to the third defendant and obtained from the latter two simple mortgage deeds, whereby the third defendant mortgaged the same properties that he mortgaged under the deeds of 28th March 1871 and of 16th October 1879. Upon these deeds the first defendant brought a suit against the third and obtained a decree for the sale of the mortgaged properties. At the sale, the properties were bought in by the first defendant.

[275] The plaintiff now sued to recover the amount due by the deed of the 16th October 1879 by the sale of the properties thereby mortgaged.

The only defence necessary to be mentioned for the purposes of this report was the defence of the first defendant to the effect that the mortgage sued on was subsequent to the mortgage-deeds on which he had sued and obtained a decree.

The Subordinate Judge decreed in favour of plaintiff.

Defendant No. 1 appealed.

*Sundara Ayyar*, for appellants.

*Subramanya Ayyar*, for respondent No. 1, plaintiff.

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* Appeal No. 172 of 1895.

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7 M.L.J. 87.

JUDGMENT.

The only point urged is the question of priority raised in the third issue. It is contended that the principle laid down by the Privy Council in *Gokoldas Gopaldas* v. *Purammal Premsukhdas* (1) is applicable only to the case of a purchaser of the equity of redemption. There is no ground for limiting the principle to that case only. It is true that that is the only case provided for by Section 101 of the Transfer of Property Act, but that is a—if not the—very extreme case where otherwise an extinguishment of the charge would ordinarily be presumed. This Court has, in several instances, applied the principle to cases like the present. *Rupabai* v. *Audimulam* (2), *Seetharama* v. *Venkatakrishna* (3), and see also judgment in appeal No. 113 of 1895.

The Subordinate Judge was, therefore, right in holding that, by the mere execution of A, the security under E in respect of the plaint debt was not given up.

The appeal accordingly fails and is dismissed with costs.

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20 M. 275.

APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

MANA VIKRAMA (*Plaintiff*), *Appellant* v. RAMA PATTER (*Defendant*), *Respondent*.* [26th March and 14th April, 1897.]

*Contract—Usage imported as term of a contract—Practice on a particular estate.*

In order that the practice on a particular estate may be imported as a term of the contract into a contract in respect of land in that estate, it must be **[276]** shown that the practice was known to the person whom it is sought to bind by it, and that he assented to its being a term of the contract : and when the person sought to be bound by the practice is an assignee for value of rights under that contract, it must also be shown that he and all prior assignees (if any) for value knew that the practice was a term of the original contract.

[D., 31 C. 561 ; 21 M.L.J. 1098 (1099) = 10 M.L.T. 378 = 12 Ind. Cas. 585.]

SECOND APPEAL against the decree of J. A. Davies, District Judge of South Malabar, in appeal suit No. 844 of 1894, confirming the decree of V. Rama Sastri, District Munsif of Temelprom, in original suit No. 245 of 1893.

The facts necessary for the purposes of this report appear sufficiently from the judgment of the High Court.

*Bhashyam Ayyangar*, *Sankaran Nayar* and *Govinda Menon*, for appellant.

*Sundara Ayyar* and *Subramania Ayyar*, for respondent.

JUDGMENT.

The appellant, the Zamorin of Calicut, sued for Rs. 541-2-6, said to be the amount of renewal fees due by the respondent, in respect of certain lands held by him under a permanent grant known as *anubhavom*, made long ago by a predecessor of the appellant to a predecessor in title of the respondent, who is an assignee for value. The original grant was made many years ago, but it was renewed or confirmed by Exhibit I in 1873. Exhibit I stipulates for the yearly rent and the amount of a certain

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* Second Appeal No. 1878 of 1895.

(1) 10 C. 1035. (2) 11 M. 345 (346). (3) 16 M. 94.

fee which the grantee was to pay, but contains no reference to any renewal fee payable to the grantor.

The appellant's claim was based on an express agreement by the respondent as well as upon custom. The Lower Courts held that the agreement was not proved, and that no binding custom was made out.

It was contended by the learned Advocate-General on behalf of the appellant that the District Judge was in error in applying to the case the rule that a party setting up a custom, having the force of law, should prove the antiquity, uniformity and certainty of the custom, inasmuch as what was set up here was not a custom of the district but the special custom prevailing in his own estate with reference to lands held under *anubhavom* tenure.

But in the plaint the custom was referred to as the "custom of the country." The Lower Court cannot, therefore, be said to have erred in dealing with it as a general custom. This consideration is sufficient to justify the dismissal of the appeal.

It is, however, desirable to point out that even upon the ground on which the claim was sought to be based before us, the appellant [277] could not succeed. For, assuming for argument's sake that the evidence in the case is, as suggested on behalf of the appellant, sufficient to prove a well-established practice, according to which persons holding under the Zamorin lands on *anubhavom* tenure make periodical payments similar to that here claimed, it is clear that such practice cannot affect the respondent's right under the assignment. Now a practice of the kind in question is not in law a '*usage*,' with reference to which the Courts are at liberty to import into a contract incidents not excluded by the terms of such contract, even though a party to the contract was not *actually* cognizant of the usage. "To constitute a usage," as was observed in *Adams* v. *Otterback* (1) by the Supreme Court of the United States when referring to a contention similar to that in the present case and which was founded on the practice of a particular bank, "it must apply to a place rather than to a particular "bank; it must be the rule of all the banks of the place or it cannot "consistently be called a usage. If every bank could establish its own "usage, the confusion and uncertainty would greatly exceed any local con"venience resulting from the arrangement." In order, therefore, to render the practice, even though invariable of particular persons, as in the present instance, relevant, as the same Court pointed out in a later case, "mere knowledge of such a usage would not be sufficient but it must appear that the custom actually constituted a part of the contract." (*Bliven* v. *The New England Screw Company* (2)). In the case just cited, a screw company being the sole manufacturers of wooden screws were unable to supply the demands of all their customers as fast as needed. The company adopted the system of apportioning their articles as fact as produced among their customers, having regard to the date of their orders. It was held that, the practice being well known to the plaintiffs who had ordered such goods, proof of the practice and of the company following it in complying with plaintiff's orders was admissible as a defence in a suit for failing to deliver in time. The same principle was recognized in *Scott* v. *Irving* (3). There evidence was given of a practice prevailing at Lloyd's in London of setting-off in account between the broker employed by the assured to recover the loss and the underwriters the amount of premium due by the broker to the underwriters [278] against the loss and that

(1) 15 Howard 545. (2) 23 Howard 431. (3) I B. & Ad. 612.

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such set-off and adjustment were treated as payment to the assured. It was held that the assured was not bound by the practice. Lord Tenterden observed, "Such a usage however can be binding only on those who "are acquainted with it and have consented to be bound by it. There may "possibly be cases proved where an assured being cognizant of such usage "may be supposed to have assented to it and therefore may be bound." *Womersay* v. *Dally* (1) is perhaps even more analogous to the present case. There the plaintiff had been a tenant of a farm belonging to an extensive estate, the property of a family named Thornhill, and the defendants had purchased certain parts of the estate including portions of the farm. It was proposed to offer evidence of a usage on the Thornhill Estate that in all lettings it should be understood that the tenants should keep one-third of their farms arable and two-thirds in grass and pay £5 an acre on leaving, for any excess beyond the proportion of arable over grass. Martin, B., refused to admit the evidence, it not appearing that the plaintiff was not cognizant of the usage. On a motion for a new trial, it was contended that the evidence was admissible on the same principle as that on which the evidence of the "custom of the country" is admitted. But Pollock, C.B., replied to the contention: "No. The "law takes cognizance of the divisions of the country into counties or "parishes which are legal and public divisions; but not into properties or "estates which are purely private in their nature. Estates may be very "small and if large are only accidentally so. It would be impossible to "draw any legal distinction between an 'estate' of 100 acres and "100,000 and there would be no legal presumption of notoriety arising "from the fact of usage as to terms of letting a particular estate. *Non* "*Constat* that the party becoming a tenant for the first time would hear "of it." And eventually the whole Court held that the evidence was clearly inadmissible, since it was as to the practice of a particular person on letting his farms—a practice not proved to have been known to the tenant.

No doubt the present case is distinguishable from those above cited, for while in them the person, who was ought to be bound by the practice, was a party who originally entered into the contract, here he is an assignee for value. But that distinction makes the [279] appellant's position only more onerous. For it is clear that the party relying on the practice should show before an assignee for value is held affected by the practice, not only that it originally entered into and formed a part of the contract, but also that the assignee, and if there have been more assignments for value than one, every prior assignee was, before he took the assignment, aware of that fact. To hold otherwise would, it is obvious, often result in injustice to assignees for value, who are certainly liable to be misled as to the nature and extent of their obligations under grants or contracts assigned to them, the written instruments evidencing which (like Exhibit I in the present case) contain no reference to the practice relied on and the incidents said to be annexed thereby. Such being the rule applicable to the appellant's case, as presented in this Court, we must hold that the appeal fails, since it is not even alleged by the appellant that the respondent had knowledge that the practice formed part of the contract. It is therefore unnecessary to enter into the other questions as to the existence of the practice and as to its forming part of the contract.

The second appeal is dismissed with costs.

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(1) 26 L.J. Exch. 220.

20 M. 279.

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## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

SANGILI VEERA PANDIA CHINNA TAMBIAR AND ANOTHER (*Plaintiffs*), *Appellants v.* SUNDARAM AYYAR AND OTHERS (*Defendants Nos.* 1 *to* 3), *Respondents.** [5th, 6th and 9th July, 1897.]

*Madras Forest Act, Sections* 10 *and* 11—*Claim to uninterrupted flow of natural stream —Jurisdiction of Forest Settlement Officer.*

A Forest Settlement Officer appointed under Section 4 of the Madras Forest Act, 1882, has, under Sections 10 and 11 of that Act, jurisdiction to decide a claim by a riparian owner to the uninterrupted flow of the water of a natural stream.

[R., 17 M.L.J. 557.]

APPEAL against the decree of S. Gopalachariar, Subordinate Judge of Tinnevelly, in original suit No. 40 of 1893.

[280] The plaintiff, the Zemindar of Sivagiri, brought this suit to establish his right to the uninterrupted flow of a natural stream called Kattar or Pedukulam. This stream flowed through Government land for some distance, and then, after flowing through the plaintiff's zemindari, emptied itself in a tank in one of plaintiff's villages.

The plaintiff complained that at a certain point in the course of the stream the defendants had recently cut a new channel which had the effect of diverting some of the water to a tank situated on Government land; and he claimed that he was entitled to an uninterrupted flow of the stream. The defendants denied the plaintiff's right to an exclusive use of the water and asserted that at the spot where the plaintiff alleged the cutting of a new channel a stream had, since the time of the ayacut, branched off to feed the tank on Government land.

The defendants also relied on a decision of the Forest Settlement Officer as constituting a bar to the present suit under Madras Act V of 1882. In 1886 a preliminary notification was issued under Section 4 of that Act, declaring that it was proposed to constitute a reserve forest. A part of the river in question, including the point at which the plaintiff alleged that a new channel had been cut, lay within the boundaries of the forest proposed to be reserved. In response to an invitation under Section 6 of the Act by the Forest Settlement Officer, plaintiff presented a claim through his agent. The nature of the claim was stated in Exhibit XI :—

"Claimant's agent states that the claim relative to the feeders of "Pedukulam is that the stream sweeping the base of Moonji Malai on either "side should be allowed to be repaired by the claimant, that the repairs he "refers to are the removal of stones, sand, trees and rubbish, and that "Kottayur Karnam Padagalingam Pillai, Muthusami Muppan and Sundara "Teven should be examined on his behalf."

"The District Forest Officer admits the claimant's right to the water "that flows naturally by the two natural streams into his tank without "prejudice to the water that flows naturally into other channels that "branch from the two natural streams in question.

"The claim to the natural flow of water into the tank is admitted by "the District Forest Officer. Claimant has produced evidence to show "that the streams feed no other irrigation work [281] than the claimant's

* Appeal No. 191 of 1895.

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"Pedukulam tank. This is disproved by evidence offered by the District "Forest Officer, from which it appears that there are branches from the "natural streams feeding other tanks belonging to Government.

"However that may be, the claimant's right to the water that flows "naturally into his tank without prejudice to what may naturally "flow into other channels is valid. To this extent, therefore, the claimant's "right is admitted and recorded under Section 11 of the Forest Act."

The Subordinate Judge dismissed plaintiff's suit.

Plaintiff appealed.

*Ramakrishna Ayyar* and *Seshachariar*, for appellant.

The Government Pleader (Mr. *Powell*), for respondent No. 3.

*Pattabhirama Ayyar*, for respondent No. 1.

*Sivarama Ayyar*, for respondents Nos. 1 and 2.

## JUDGMENT.

The question in this appeal relates to the rights of the parties to the use of the natural stream called Kattar or Pedukulam.

The stream rises in, and flows through, Government lands, before it empties itself into the Pedukulam tank, which is situated within the zemindari of the plaintiff.

The defendants Nos. 1 and 2 are persons who hold land under Government, which land is now partly irrigated by a channel taken off from the said stream within the limits of the Government land above the zemindari.

The third defendant is the Secretary of State for India in Council.

Plaintiff sues to establish his exclusive right to the waters of the stream and for an injunction to restrain the defendants from in any way interfering with that exclusive right.

This claim to exclusive right to the water was put forward before the Forest Settlement Officer in 1886, and was by him disallowed after due enquiry under Act V of 1882 (The Madras Forest Act).

The plaintiff did not appeal against that decision, and it therefore became final.

The Subordinate Judge, therefore, held that the plaintiff was precluded from re-agitating the question in this suit.

The plaintiff, as appellant before us, contends that the Subordinate Judge was in error, on the ground that the Forest [282] Settlement Officer had no jurisdiction to give an adjudication on the question. The appellants argument is that the exclusive right which he now claims over the water is not one of those rights which are specified in Section 10 or 11 of the Act, and in regard to which alone the Forest Settlement Officer had jurisdiction. We cannot accept this contention. As a mere riparian proprietor the plaintiff could only have a right to the lawful use of the water flowing through his land subject to the similar rights of other riparian proprietors, but his claim to the exclusive use of the water shows that he claimed more than the rights of riparian proprietor. Now a claim to use the water of a natural stream in a manner not justified by natural right is undoubtedly a claim to an easement. (Gale on Easements, p. 20, 6th Edition.)

In other words, the right claimed by the plaintiff was, in the language of Lord Watson in *Dalton* v. *Angus* (1), "a right of property in the owner "of the dominant tenement—not a full or absolute right—but a limited right

(1) L.R. 6 App. Cas. 740 (830),

"or interest in land which belongs to another whose *plenum dominium* "is diminished to the extent to which his estate is affected by the "easement." 1897 JULY 9.

It seems, therefore, clear that the right claimed by the plaintiff was a right in respect of water flowing in a defined channel on Government land, that is of a water-course, and, therefore, within the jurisdiction of the Forest Settlement Officer under Section 11. APPELLATE CIVIL.

It is contended by the appellant that the rights of way, pasture and forest produce referred to in Clauses (*a*), (*c*) and (*d*) of the section are rights to be exercised on the land itself, and that, by analogy, the right to a water-course referred to in Clause (*b*) must be of a similar restricted kind. There is, in our opinion, no ground for such a limitation, but even if it were otherwise, the right which the plaintiff claims was such as falls within the words "a right in or over any land" in the first line of the section, and was, therefore, a right in respect of which the Forest Settlement Officer had jurisdiction to adjudicate under Section 10. 20 M. 279.

In a word, the right claimed was one on which the Forest Settlement Officer had a right to adjudicate either under Section 10 or Section 11, and in either case, the appellant's objection that he had no jurisdiction fails. The result is that on this ground [283] alone the decree of the Subordinate Judge dismissing the suit must be upheld.

It was, however, urged that even if the plaintiff had not an exclusive right to the water of the stream, he had a right as a lower riparian proprietor to obtain an injunction to restrain the defendants from using the channel inasmuch as such user was in excess of the third defendant's right as a higher riparian proprietor. In regard to this we observe that neither in the plaint, nor when framing issues, did the plaintiff rely on his rights as a riparian proprietor, or raise any issue as to whether the defendant had used the water in a manner not justified by their riparian rights, and the question has not been tried. Considering how long the matter has been in dispute we do not think we should be justified in allowing the plaintiff to raise at this stage a fresh issue of fact which he might and ought to have raised in the Lower Court.

We must, therefore, dismiss the appeal with costs.

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**20 M. 283 = 7 M.L.J. 134.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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RAGAVENDRA RAU AND ANOTHER (*Defendants*) *Appellants v.* JAYARAM RAU (*Plaintiff*), *Respondent.** [10th. 11th, and 30th March, 1897.]

*Hindu Law—Marriage—Prohibited degrees.*

A marriage between a Hindu and the daughter of his wife's sister is valid.

[F., 27 A. 417 = 2 A.L.J 36 = A.W.N. (1905) 20; 32 B. 619 = 10 Bom. L.R. 948.]

APPEAL against the decree of E.J. Sewell, District Judge of North Arcot, in original suit No. 41 of 1893.

Suit for partition by the adopted son of one Narasinga Rau against the undivided nephew of the latter.

The facts of this case sufficiently appear from the judgment.

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* Appeal No. 111 of 1 96.

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*Sankaran Nayar* and *Narayana Rau*, for appellants.

*Bhashyam Ayyangar*, *Pattabhirama Ayyar* and *Shadagopachariar*, for respondent.

JUDGMENT.

That the late Narasinga Rau's widow Seshammal did in fact adopt the respondent as the son of her husband was [284] practically admitted on behalf of the appellants, the first of whom is Narasinga Rau's undivided nephew and the second that appellant's son, a minior. It was, however, contended on their behalf that Narasinga Rau did not authorise Seshammal to make the adoption and even if it is found that he did so authorise her, the adoption is invalid in consequence of the relationship which existed between Narasinga Rau and the natural mother of the respondent.

Now as to the authority, we are satisfied that the evidence on the point adduced on behalf of the respondent fully establishes that a few days before his death, Narasinga Rau gave Seshammal power to take the respondent in adoption. The testimony of the witnesses who speak to this point is highly probable. It is clear, that, for several years before Narasinga Rau died, both he and Seshammal had been on unfriendly terms with the first appellant. It appears also that since the time the male child which Seshammal bore to Narasinga Rau died about the year 1888, the latter had been desirous of adopting a son. Narasinga Rau's letter Exhibit Q, the genuineness of which there is no reason to doubt, furnishes cogent evidence of Narasinga Rau's anxiety to secure a boy for adoption. And another strong circumstance in favour of the view that Narasinga Rau had empowered his wife to adopt is the first appellant's omission to impeach the authority when, not long after Narasinga Rau's death, it was set up in an enquiry before the Tahsildar with reference to the mutation of names in the registry relating to the lands in litigation. Though the first appellant's attention was pointedly drawn to the contents of Exhibit B, a deposition given by the natural father of the respondent, before the Tahsildar wherein it was distinctly asserted that Narasinga Rau had authorised Seshammal to adopt a son ; the first appellant took no exception to that assertion, though if the evidence now adduced on his behalf were true, he must have known that the claim that Narasinga Rau had given such authority was totally unfounded.

We, therefore, concur with the Judge's finding that the authority set up is true.

Next as to the validity of the adoption so far as we were able to follow the appellants' vakils' arguments on the point, the chief contention was this—

The respondent's natural mother, being Seshammal's sister's daughter, could not, under the Hindu Law, have been lawfully [285] married to Narasinga Rau, and therefore the respondent could not have been validly adopted as his son. It being the settled law of this Court, except where there is evidence of special usage to the contrary, that the natural mother of the boy to be adopted, should be a person, who, in her maiden state, might lawfully have been married to the man for whom the adoption is to be made, the question for determination is whether a Hindu is, by law, precluded, as the appellants contend, from marrying his wife's sister's daughter. In support of this contention we were not referred to any text either in the *smrithis* or in the leading commentaries. The only text, to which our attention was drawn on behalf of the appellants, is to be found in Aswalayana's 'Grihya Parisishta' which runs thus :

"*Viruddha Sambanda* is that sambandhi (relation) which is *viruddha* "(contrary or improper) owing to the relationship (existing) between the "bride and the bridegroom (before their marriage) being similar to that "of a father or mother. As for instance the daughter of a wife's sister (and) "the sister of the paternal uncle's wife." (Mandlik's 'Hindu Law', p. 484.) A glance at the numerous rules, laid down by the ancient Hindu legislators with reference to the selection of a bride, is enough to show that they are, with very few exceptions, mere rules of caution and advice. Now does the passage, relied on by the appellant, belong to this class of hortatory texts, or does it lay down a rule of law rendering a marriage contrary to it unlawful? That it belongs to the former class is evident from the fact that none of the well-known authoritative commentaries prohibit the marriage of a wife's sister's daughter—a fact which by itself is sufficient to render it to the duty of the Courts to decline to accept the text in question as laying down an imperative rule. Nor is authority wanting to support this view. In Kulluka Bhatta's remarks on Manu III, 6 to 11, referring to the numerous minor objections to be avoided in selecting a bride, the commentator in terms points out that a violation of none of the rules contained in them affects the legality of the union. (Gurudass Bannerjee's 'Marriage and Stridhanam,' p. 56.) But in his comments on verse 5 of the same chapter, which deals with the really forbidden marriages between *Sagotras* and *Sapindas*, he observes thus: "In the matter of "marriage, as it has been ordained in this text, 'He who inadvertently "marries a girl sprung from the same original stock with himself (*Sagotra*) "and so forth must support her as a mother' and as it has been said "[286] (by certain legislators) that if girls of the same *gotra* and so forth "be taken in marriage they must be deserted and that penance must be "performed if a marriage be contracted with a girl of the same *gotra*, consequently together with those, the girls related as mother's sapindas do "not also become wives." ('Vyavastha Chandrika,' Vol. II. p. 475.) These observations clearly lead to the inference that marriages are to be held to be unlawful only in cases, as to which desertion of the girl and the observance of penance for atoning the offence committed in entering into the prohibited alliance are laid down by accepted authorities. But it is not pretended that any authority prescribes that if a man marries his wife's sister's daughter he must abandon her and perform penance. Further, nearly all the recent important text writers, who have considered the matter, are agreed that a marriage between a man and his wife's niece is valid.

Dr. Gurudass Bannerjee in his work on 'Marriage and Stridhanam' already cited, states that the law "does not prohibit" marriage with the wife's sister or even with her niece or her aunt" (p. 69). Syama Charan Sircar in the note to Vyavastha, 712 of the 'Vyavastha Chandrika,' wherein he states the substance of the authorities as to void marriages excludes from that category unions such as those described by him in Vyavastha, 698, inclusive of that between a man and his wife's sister's daughter (Vol. II, pp. 475 and 463). Mr. Mandlik in his edition of 'Vyavahara Mayuka and Yajnavalkya' observes: "As regards *Viruddha Sambandha* they are "permitted as a matter of course." (Appendix, p. 415.) Golap Chunder Sircar in his work on 'The Hindu Law of Adoption' expresses himself thus: "But be it specially noticed that no marriage is invalid on the ground of "relationship being incongruous. In addition to the two instances mentioned in 'Grihya Parisishta' of Aswalayana there are other passages "prohibiting on the self-same ground the marriage by a man of his

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"step mother's sister, her brother's daughter and his children's daughter "as well as the preceptor's daughter; but however improper such "marriages may be, they are nevertheless valid. Such marriages "are generally contracted by high-class Brahmans of Bengal who "are compelled by the restrictions imposed by Kulinism to choose "their wives from a certain limited number of families" (p. 319). "Lastly Jogendra Nath Bhattacharya expresses substantially the "same view in his Commentaries on Hindu Law. He writes "A text "[287] of Baudhayana and a passage from 'Grihya Parisishta' are cited in "the Nirnaya Sindhu which excludes the following:—

"(1) Stepmother's sister and sister's daughter.

"(2) Paternal uncle's wife's sister.

"(3) Paternal uncle's wife's sister's daughter.

"(4) Wife's sister's daughter.

"The texts which exclude these or neither cited nor commented upon "by Raghunandhana. In practice no hesitation is felt in this part of "India in marrying paternal uncle's wife's sister. Marriage with step-"mother's sister takes place sometimes in Bengal. Instances of marriages "with wife's sister's daughter are also not altogether unknown in Bengal, "though Hindu sentiment is very strong against these marriages." (2nd edition, p. 95.)

With reference to this concluding observation of Mr. Bhattacharya regarding the sentiments of the people as to the propriety of such marriages, it may perhaps be pointed out that there is little to indicate that these marriages are disapproved of by the members of any section of the community in this part of India. Be this however as it may, the unimpeachable evidence, adduced on behalf of the respondent, shows beyond the shadow of a doubt that marriages between a man and his wife's sister's daughter are common among the various sections of the Brahmin community and are regarded by all as perfectly valid. It is necessary to refer to this evidence briefly. The specific instances of marriages spoken to by the witnesses took place in various parts of the Presidency widely separated from each other, *viz.*, the following eight districts:—Nellore, Madras, North Arcot, South Arcot, Tanjore, Trichinopoly, Coimbatore and Madura. The Honourable Mr. N. Subba Rao belonging to the Madhwa sect, a Vakil of this Court, stated that his own mother's sister was married to a person who had previously married that lady's maternal aunt. The witness also stated that his paternal grandfather, after the first wife's death, married that wife's sister's daughter and that the marriages, spoken to by him, took place long ago. These cases probably belong to the Nellore district. Mr. V. C. Desikachariar, an Ayyangar and a practitioner of this Court, residing in Madras, stated that his mother-in-law, who is his father-in-law's second wife, is the daughter of her husband's first wife's sister. The witness added that the late Mr. V. Sadagopacharlu, who was a very distinguished Vakil of this Court, had married the sister of his (Sadogopacharlu's) [288] paternal uncle's wife and this took place long ago. Krishnaswami Ayyar, a Smartha Brahmin of Chittoor in North Arcot, deposed that his father married about twenty-five years ago, as his second wife, the witness's aunt who was the sister of the witness's mother. Ramachandra Ayyar, a Smartha Brahman of Chidambaram in South Arcot, stated that his fourth and present wife is the daughter of his deceased third wife's sister and that the marriage took place in 1888. Ramakrishna Dikshathar, another Smartha Brahmin also from South Arcot, said his second wife is his first wife's sister's daughter and that he was married thirteen

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years ago. Mr. Govinda Rao, who is of the Madhwa sect and who is employed as Cirkil under the Collector of Tanjore, stated that he is married to his deceased wife's sister's daughter. P. Srinivasachariar, an Ayyangar, also belonging to the same district, stated that he had married the sister of Dewan Bahadur Srinivasa Raghava Ayyangar, the present Dewan of Baroda, and that when she died, he, the witness, married her sister's daughter. Mr. Srinivasa Rao, a Madhwa gentleman now in Bangalore, gave evidence to the effect that on the death of his first wife, the late Raja Sir T. Madhava Rao's daughter, the witness married her sister's daughter. Dewan Bahadur Raghoonatha Rao stated that, in addition to two instances already referred to, *viz.*, those of Govinda Rao of Tanjore and Srinivasa Rao of Bangalore who are both related to him, he knew many cases of a man marrying the niece of his wife. Ramachariar, who is a Madhwa too, spoke to having been present at seven or eight such marriages either in the Trichinopoly, Coimbatore or Madura district, and added that about 18 or 19 years ago he himself married his deceased wife's sister's daughter. Krishna Rao, the District Munsif of Kulittalai, stated that a sister of his and a daughter of another of his sisters were successively married to the same man in Coimbatore. Nearly all the witnesses affirmed positively that no exception whatever was at any time taken to any of the marriages spoken to by them.

On the part of the appellants nothing has been really urged to rebut the irresistible inference arising from such widespread usage as that established by the evidence just noticed, in favour of the validity of the marriages which the text of Aswalayana condemns on the ground of incongruous relationship.

We have, therefore, no hesitation in holding that the said text is not mandatory and that the appellant's contention founded thereon is entirely unsustainable.

**[289]** We think we are not precluded from arriving at this conclusion by the reference made to the above text in *Minakshi* v. *Ramanatha* (1). It would seem that on the strength of the statement in the *Dattaka Mimamsa* that a marriage between the persons mentioned in the text in question was a prohibited connection, it was assumed by the Court that the text was mandatory. But whether the text was mandatory or merely hortatory was not a matter for determination in that suit, and therefore the Court's observations cannot be treated as a binding decision on the point.

The only other objection taken to the legality of the adoption rested on the fact that the adoptive mother Seshammal is the cousin of the natural father of the respondent. But this contention also is untenable; since it has been ruled in this Court that the adoption of a son of even a wife' s brother is good (*Sriramulu* v. *Ramayya* (2)). It is scarcely necessary to say that it is immaterial in such a case whether the adoption is made by a man himself or by his widow after his death; for the adoption is for him.

We must, therefore, confirm the decree of the District Judge and dismiss the appeal with costs.

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(1) 11 M. 49.

(2) 3 M. 15.

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20 M. 289=
7 M.L.J. 30.

20 M. 289=7 M.L.J. 30

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

VELU GOUNDAN (*Plaintiff*), *Appellant v.* KUMARAVELU GOUNDAN AND OTHERS (*Defendants*), *Respondents.** VELU GOUNDAN (*Plaintiff*), *Petitioner v.* KUMARAVELU GOUNDAN (*Defendant*), *Respondent.** [27th November and 10th December, 1896.]

*Suit for partition of family property—Valuation of, for purposes of jurisdiction—Suits Valuation Act,* 1887—*Court Fees Act,* 1870, *Section* 7, *Clause* (*iv*) *b.*

In a suit by a member of a joint Hindu family praying for a partition of the family property and for the delivery to the plaintiff of his share, the value of the [290] suit for the purposes of jurisdiction is the amount at which the plaintiff values his share.

[Appr., 32 C. 734=9 C.W.N. 690; R., 15 C.P.L.R. 81 (84); 15 C.P.L.R. 120 (122); 8 Ind. Cas. 512=21 M.L.J. 21 (29)=9 M.L.T. 3; 13 Ind. Cas. 903=11 M.L.T. 155=(1912) M.W.N. 199 (201); D., 6 C.L.J. 651=12 C.W.N. 37.]

APPEAL against the order of C. Gopalan Nayar, Subordinate Judge of Madura (East), directing the return of the plaint presented by appellant for presentation to the proper Court, and petition under Section 622 of the Code of Civil Procedure praying the High Court to revise the order of W. Dumergue, District Judge of Madura, in civil miscellaneous appeal No. 37 of 1895, confirming the order of J. S. Gnanyar Nadar, District Munsif of Manamadura, in original suit No. 220 of 1895.

Plaintiff brought this suit originally in the Court of the District Munsif for partition alleging that the property to be divided was the property of a joint Hindu family consisting of himself, his father, his step-mother and the son of his step-mother. The following were the prayers of the plaint:—

"To divide and deliver to the plaintiff one-third share in the A "scheduled properties 1 to 29 by casting chits with strict regard to the "nature and fertility of the lands;

"To make the defendants give to plaintiff one-third share in the B "scheduled property 1 to 21 or pay the value thereof;

"To order the defendants to pay plaintiff the loss for fasli 1304 and "costs of the suit together with further loss and to give decree with other "reliefs as the Court may deem fit to grant considering the nature and "circumstances of the case."

In the plaint the plaintiff valued his share of the property at Rs. 1,996-4-0.

The District Munsif held that he had no jurisdiction, because that was determined by the value of the whole family property, which exceeded Rs. 4,000, and not by the value of the share claimed. In support of this position, the District Munsif quoted the rulings in *Vydinatha* v. *Subramanya* (1), *Khansa Bibi* v. *Syed Abba* (2), *Ramayya* v. *Subbarayudu* (3), *Krishnasami* v. *Kanakasabai* (4).

The plaint was thereupon presented to the Sudordinate Court of Madura (East), and the Subordinate Judge also returned the plaint for presentation to the proper Court on the ground that "Section 8 of the Suits Valuation Act, read with Clause [291] (iv) *b* of Section 7 of the

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* Appeal against Order No. 98 of 1886 and Civil Revision Petition No. 74 of 1896.

(1) 8 M. 235. (2) 11 M. 140. (3) 13 M. 25. (4) 14 M. 183.

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"Court Fees Act, would make the value of the suit both for Court-fees "and jurisdiction to be the value of the plaintiff's share, which, he says, "is Rs. 1,996-4-0," and that the suit was, therefore, within the District Munsif's jurisdiction.

The plaintiff then appealed to the District Judge against the District Munsif's order alone. The District Judge held that the order of the District Munsif was correct and dismissed the appeal. The plaintiff now filed a petition under Section 622 of the Civil Procedure Code, praying for the revision of order of the District Court, and filed an appeal against the order of the Subordinate Judge.

*Sivasami Ayyar*, for appellant.

Respondents were not represented.

## JUDGMENT.

Plaintiff, a member of an undivided Hindu family, sued for partition and delivery to him of his one-third share of the joint family property.

The value of the share claimed was below Rs. 2,500, but the value of the whole property exceeds Rs. 4,000.

The District Munsif, following the ruling in *Vydinatha* v. *Subramanya* (1), declined jurisdiction and returned the plaint for presentation to the proper Court. His action was upheld on appeal to the District Judge. The plaintiff meantime presented his plaint to the Subordinate Judge, who also declined jurisdiction and returned the plaint to be presented to the proper Court. The Subordinate Judge held that, under Section 7, Clause (iv) *b* of the Court Fees Act, the suit should be valued for purposes of court-fees at the relief sought in the plaint, *viz.*, at the value of the share claimed, which was less than Rs. 2,500; and that, under Section 8 of the Suits Valuation Act (VII of 1887) the valuation for purposes of of jurisdiction should follow and be the same as that for court-fees, and that, therefore, the suit was within the jurisdiction of the District Munsif.

The view of the Subordinate Judge is, in our opinion, correct, and in accordance with the law as laid down in the Suits Valuation Act, which it seems to us expressly altered the law as laid down in *Vydinatha* v. *Subramanya* (1).

Some doubt was sought to be thrown on this view by the fact that in three cases *Khansa Bibi* v. *Syed Abba* (2), *Ramayya* v. **[292]** *Subbarayudu* (3) *Krishnasami* v. *Kanakasabai* (4) all decided after the passing of the Suits valuation Act—the decision in *Vydinatha* v. *Subramanya* (1) was treated as still containing the law applicable to the question.

In those cases, however, no reference was made to Section 8 of the Suits Valuation Act, nor did they directly declare that the ruling in *Vydinatha* v. *Subramanya* (1) still governs cases within its scope.

Moreover, in the recent case of *Chakrapani Asari* v. *Narasinga Rau* (5) this Court expressly approved the view that "when the suit relates "to co-parcenary property, unless it is one for general partition among all "the shareholders, the specific and definite share claimed must be held "to be the subject-matter of the suit as stated in this Suits Valuation Act "and Act III of 1873 (The Madras Civil Courts Act), and the value of "the same should determine the Court's jurisdiction, and not that set on "the whole property, which will, of course, be the value of a suit in "which a general partition of all the shares may be prayed for." We think

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(1) 8 M. 235. (2) 11 M. 140. (3) 13 M. 25.
(4) 14 M. 183. (5) 19 M. 56.

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that these words correctly set forth the law as it now stands. The present suit, therefore, being for a share of the co-parcenary, and not involving a general partition, and the share being less than Rs. 2,500 in value, is within the jurisdiction of the District Munsif. We, therefore, confirm the order of the Subordinate Judge and dismiss this appeal, and in exercise of our revisional jurisdiction, we set aside the orders of the District Judge and of the District Munsif, and direct the District Munsif to receive the plaint and deal with it according to law. Costs throughout will be provided for in the decree of the District Munsif.

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20 M. 293.

## [293] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

KAMARAZU AND ANOTHER (*Defendants Nos. 1 and 2*), *Appellants v.* VENKATARATNAM (*Plaintiff*), *Respondent.**
[10th December, 1896.]

*Will by a Hindu—Construction of—Gift to daughter—Daughters' estate.*

A Hindu by will bequeathed to his daughters is separate property to be enjoyed by them 'as they pleased';

*Held*, that the daughters took an absolute estate.

APPEAL against the decree of G. T. Mackenzie, District Judge of Godavari, in original suit No. 12 of 1894.

The plaintiff brought this suit to declare that he was entitled to certain monies in the hands of the defendants after the death of the widow and daughter of one Mallaya.

The monies in question were the proceeds of certain jewels which had been given by Mallaya's widow and daughter to the defendants for charitable purposes.

The plaintiff claimed to be entitled to the monies as the reversioner to the estate of Mallaya, by whom he had been adopted, and with whom he had subsequently effected a partition.

The defendants contended that the jewels were the stridhanam of Mallaya's widow and daughter, but on this point no decision was given either in appeal or in the lower Court, it being assumed by the Courts that the jewels had been inherited under the will of Mallaya. The will of Mallaya, after reciting amongst other things that provision had been made for the maintenance of his eldest daughter-in-law, proceeded :—

"Out of the rent of the bazaar godown, the expenses relating to the "repairs, &c., of the said godown and also the maintenance allowance which "I have been paying every year to my eldest daughter-in-law, Nadipilly "Ademmah, is deducted, and the balance of rent is divided and taken in "equal shares by myself and my adopted son—I taking one half, and "he the other half—in accordance with the deed of partition entered "into between myself and my adopted son. It is hereby arranged [294] "that my three daughters mentioned above, should, after my death, receive "the amount relating to the half share I have been receiving. In the "matter of the house in which (I am) residing, my adopted son Venkata-"ratnam should enjoy one half and my daughters the other half as

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* Appeal No. 181 of 1895.

"mentioned in the *Pharikhat*, after the death of myself and my wife. My "three daughters, *viz.*, the said Kankatala Bangaramma, Korangi Rattamma and Devata Bhuanamma, should, from the date of my death, take "possession of the whole of my moveable and immoveable property—the "whole of the moveable property relating to the Soroff trade carried on "by me and referred to above, as also all the transactions, accounts, &c., "relating thereto and also the said immoveable property—and enjoy the "same happily as they please. The aforesaid people, that is to say, my "daughters in-law and my adopted son, have no right whatever to cause "any obstruction in respect of my property. Even if they cause any, "they shall not be valid. My daughters aforesaid should properly attend "to the wants of myself and my wife till our death. My three daughters "aforesaid should, after my death, take possession of *Pharikhat* and other "documents which are with me, as also the aforesaid property, and manage the same as they please. I caused this will to be written while I am "steady in mind and of my own free will. This should take effect from "the date of my death."

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Of the three daughters, two had died before the gift of the jewels in question.

The District Judge said: "The will which is now admitted by both "parties leaves the father's property to his wife and daughter to be enjoyed "as they please. Notwithstanding these words, I hold that this will "bestow nothing more than the usual widow's and daughters' life-interest. "If the property in question were land, they could not alienate it. Defendants, however, contend that this is moveable property at the disposal of "these ladies. I cannot accept this contention. It is not alleged that "this Rs. 4,000 was taken from the income of the estate. As the greater "part of it was jewels, it seems to have been part of the corpus of the "estate. I am of opinion that not even the charitable object of the "alienation justifies the alienation, and that plaintiff is entitled to the "declaration which he solicits." And in the result gave a decree for plaintiff.

Defendant appealed.

[295] *Subba Rao* and *Gopalasami Ayyangar*, for appellants.

Mr. *Smith*, for respondent.

## JUDGMENT.

The terms of the will read in the light of the deed of partition referred to therein clearly indicate that the intention of the testator was to confer on his daughters an absolute, and not a limited, estate, in so far as the moveable property which was at his absolute disposal was concerned. There is nothing in the instrument or in the surrounding circumstances, which could lead one to think that the intention was to limit the gift to a daughter's estate, or, in other words, simply for their lives. The daughters thus having taken an absolute estate, the alienation sought to be impeached was within their rights. We must, therefore, overrule the view taken by the District Judge, and in reversal of his decree we dismiss the suit with costs throughout. This involves the dismissal of the memorandum of objections also.

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APPELLATE CIVIL.

20 M. 295.

20 M. 295.

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

THILLAI CHETTI (*Defendant No.* 1), *Appellant v.* RAMANATHA AYYAN AND OTHERS (*Plaintiffs*), *Respondents.**
[24th and 27th November, 1896.]

*Mortgage to a co-owner—Suit to redeem—Right of one or more co-owners to redeem in absence of partition.*

When several owners of undivided shares in immoveable property mortgage their share with possession to another undivided sharer, a smaller number than the whole body of co-mortgagors cannot sue to redeem the mortgage until there has been a partition of the property mortgaged among the several co-owners. *Mamu* v. *Kuttu* (1) followed; *Naro Hari Bhave* v. *Vithalbhat* (2) distinguished.

[**N.F.**, 2 P.R. 1904=48 P.L.R. 1904.; **R.**, 11 Ind. Cas. 100=62 P.R. 1911=197 P.L.R. 1911; **Com.**, 17 Ind. Cas. 837 (839)=23 M.L.J. 576 (580)=12 M.L.T. 484=(1912) M.W.N. 1168 (1170); **D.**, 15 Ind. Cas. 605 (606)=23 M.L.J. 475.]

SECOND appeal against the decree of W. Dumergue, District Judge of Madura, in appeal suit No. 803 of 1894, confirming the decree of S. Authinarayana Ayyar, District Munsif of Mana Madura, in original suit No. 58 of 1894.

**[296]** The plaintiff and defendants were the undivided co-sharers of a Dharmasanam village. The predecessors in title of the plaintiff and of defendants 2 to 44 had mortgaged with possession their shares to the predecessors in title of the first defendant on the 20th August 1840. The plaintiff now sued to redeem the mortgage and deposited in Court the full amount of the mortgage, and he also prayed for a decree directing the first defendant to deliver up possession of the land to the plaintiff on behalf of all the sharers.

The first defendant contended that the plaint lands appertained to 120 pangu samuthayam. Out of the said 120 pangus, 28-8-6 pangus belonged to him, $1\frac{3}{4}$ and odd pangus to the plaintiff, and the rest to the other defendants. That the plaintiff, who owned only a few pangus, had no right to redeem the mortgage of the plaint lands for the village samuthayam from the first defendant who owned more pangus. That the other pangalis had not given the plaintiff permission to redeem the mortgage, and that though it should be found that the plaintiff had a right to redeem the mortgage, the plaintiff had no right to pay the share due for the first defendant's pangu, and to demand possession from the first defendant so far as the first defendant's share of the pangu was concerned.

Of the remaining 43 defendants, four supported the plaintiff's claim and 30 applied to be made plaintiffs, seven did not enter an appearance, and the remaining two entered an appearance, but did not contest the suit at the hearing.

The Munsif passed a decree that, "on receipt of the mortgage money "deposited in Court (Rs. 75-4-0), first defendant do put plaintiffs in "possession of the mortgaged property with all title-deeds in his possession "relating to the mortgaged property described in the plaint."

* Second Appeal, No. 1008 of 1895.

(1) 6 M. 61. (2) 10 B. 648.

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The first defendant appealed to the District Judge who dismissed the appeal, saying "with regard to the appeal it is contended that, under "Section 60, Clause 4 of the Transfer of Property Act, the plaintiffs were "entitled to sue for redemption of their shares only and not of the whole "property. As the first defendant has not acquired the share of a mort-"gagor, the agrument is clearly opposed to the law."

The first defendant appealed to the High Court on the following grounds:—

[297] "The decrees of the Courts below are against the provisions "of Section 60, Transfer of Property Act.

"The Courts below erred in law in drawing a difference between a "co-mortgagee and a co-owner.

"The Courts below failed to notice that the first defendant owned "28 shares out of the total number of 120 shares and he could not, there-"fore, be ousted from possession.

"The first defendant's ownership is distinctly raised in the second "paragraph of his written statement and plaintiffs have not denied it.

"Even if the said right were disputed, the Courts below ought to "have ascertained the extent of the shares belonging to the first defend-"ant.

"The plaint has not been properly framed, and the Courts below "ought to have dismissed the plaintiff's suit."

*Mahadeva Ayyar*, for appellant.

*Natesa Ayyar*, for respondents.

JUDGMENT.

In this case the plaintiffs and defendants are the owners in shares of a certain village.

In 1840 the owners of the village mortgaged it to the first defendant's ancestor for Rs. 75-4-0. The plaintiffs sued to redeem the mortgage. The first defendant claimed to own the largest share of the village and objected to plaintiff's right to redeem the mortgage without the consent of the co-mortgagors. He specially objected to the plaintiff's right to redeem his (first defendant's) share of the mortgage. The District Munsif found that it could not be satisfactorily decided in the present suit to what share the first defendant was entitled, and on the strength of *Naro Hari Bhave* v. *Vithalbhat* (1) decided that plaintiffs had a right to redeem the mortgage. He, therefore, decreed that, on payment of the mortgage money into Court, the first defendant should put the plaintiffs into possession of the mortgaged property with its title-deeds. In appeal before the District Court it was argued that, under Clause 4 of Section 60 of the Transfer of Property Act, the plaintiffs were entitled to redeem their own shares only, but not to redeem the whole property. The District Judge, however, held the argument to be invalid, "as the first "defendant had not acquired the share of the mortgagor," and dismissed the appeal.

[298] Against this decree the first defendant now urges this second appeal, and we think his plea is well founded. The decree is manifestly wrong and unjust since it requires the first defendant, who is not only the mortgagee, but also one of the chief owners of the property, to give up his possession of the property, including his own share, to the plaintiffs on payment of the mortgage money. No provision is made for securing to

(1) 10 B. 648.

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the first defendant or the other sharers of the village possession of their shares on their paying the plaintiffs their shares of the mortgage money, nor could any such provision be made in the present suit since their respective shares have not been ascertained and could not be conveniently ascertained in the suit. Thus the result of the decree would be to compel the first defendant and other co-owners and co-mortgagors to bring suits for the ascertainment of their shares and for the recovery of the same from the plaintiffs on payment of their contribution towards the mortgage money. This is the very evil which was pointed out and guarded against by the learned Judges who decided the case of *Mamu* v. *Kuttu* (1). There the fifth defendant was the purchaser of a share of the equity of redemption and was also the mortgagee in possession, and it was held that "to allow plaintiff to redeem the whole would enable "him to get possession of the property to the exclusion of fifth defendant. "Now, as fifth defendant is already in possession as assignee of the "mortgagee and has also a share in the right to redeem, he cannot be "required to surrender possession of the whole against his consent until "plaintiff has, by a proper suit for partition, ascertained definitely to what "shares in the property he and fifth defendant are, respectively, entitled.

"We cannot, therefore, allow a decree for redemption of the whole. "A decree for redemption of a portion is equally impossible, for that "would be to convert the suit into a suit for partition, which, without "the consent of all the parties, could not be permitted."

That case is exactly on all fours with the present case and indicates the proper course for the plaintiffs to take if they desire to redeem the mortgage on their shares of the property. It is only necessary, in conclusion, to point out that the case *Naro Hari Bhave* v. *Vithalbhat* (2) relied on by the District [299] Munsif proceeded on entirely different grounds. In that case the plaintiffs had a clear right to redeem the whole property at the time when they brought their suit, and the Court refused to allow that right to be defeated by the action of the defendants in purchasing a share in the equity of redemption *post litem motam*, but intimated that, if the defendants had acquired the share before suit, it would have been necessary to consider whether the ruling in *Mamu* v. *Kuttu* (1) should not have been followed. The District Judge also in the present case appears to have been under some misapprehension. He apparently thought that it was necessary for the first defendant to show that he had acquired the share of a mortgagor subsequent to the date of the mortgage. But that is not so. It is the possession of the twofold interest as mortgagee and mortgagor (prior to the plaintiffs' suit) that is of importance. First defendant had such twofold interest from the date of the mortgage, and the rule laid down by this Court in the case already quoted is clearly applicable.

We must, therefore, reverse the decrees of the Courts below and dismiss the plaintiffs' suit with costs throughout.

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(1) 6 M. 61.

(2) 10 B. 648.

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## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

VENKATANARASIMHA NAIDU (*Plaintiff*), *Appellant v.* DANDAMUDI KOTAYYA (*Defendant*), *Respondent.**
[22nd July and 20th August, 1897.]

*Landlord and tenant—Zemindar and raiyat—Relation between.*

A raiyat cultivating land in a permanently-settled estate is *prima facie* not a mere tenant from year to year, but the owner of the kudivaram right in the land he cultivates.

[Fol., 13 M.L.T. 450 (457)=(1913) M.W.N 434; R., 21 M. 116 (121) (F.B.); 21 M. 433 F.B.); 23 M. 318; 26 M. 252 (255)=12 M L J. 449; 27 M. 401 (405); 28 M. 444 (450)=15 M.L.J. 29; 30 M. 155=17 M.L.J. 64=2 M.L.T. 25; 17 Ind. Cas. 481 (483); 13 M.L.J. 81 (82).]

SECOND appeal against the decree of G. T. Mackenzie, Acting District Judge of Godavari, in appeal suit No. 253 of 1895, modifying the decree of S. Pereira, Acting District Munsif of Ellore, in original suit No. 100 of 1892.

The plaintiff was the Zemindar of Vallur, a permanently settled estate, and the defendant cultivated land in that zamindary. [300] On the 4th March 1891 the plaintiff served on the defendant a notice to quit. The defendant did not quit the land, and in 1892 the plaintiff brought this suit to eject him. The District Munsif passed a decree in favour of the plaintiff. On appeal the District Judge, holding that the plaintiff had failed to prove that the defendant's tenancy had commenced since the date of the Permanent Settlement, reversed the decree of the District Munsif. Plaintiff appealed.

*Pattabhirama Ayyar*, for appellant.

*Ramachandra Rau Saheb*, for respondent.

## JUDGMENT.

In this case the plaintiff, the holder of a permanently-settled estate, seeks, among other things, to eject the defendant from certain lands. Admittedly, the lands are situated within the plaintiff's estate and are subject to an annual assessment payable by the defendant to the plaintiff.

The decision of the case depends solely upon these facts, no other facts having been satisfactorily established by the evidence.

In this state of the case the lower appellate Court dismissed the suit in so far as the prayer for possession was concerned. On behalf of the plaintiff it was contended that the dismissal was erroneous, and that the error was caused by the lower appellate Court having wrongly thrown the *onus* of proof on the plaintiff. The argument in support of the contention was that upon the admitted facts, the finding must be that the defendant was a tenant from year to year; and as due notice to quit had been given, the tenancy had been determined before the date of the action and the defendant ought to have been ejected.

Section 106 of the Transfer of Property Act, to which reference was made on behalf of the plaintiff, does not apply to the case. If, however, there were a similarity between the relation of landlord and tenant in England and that subsisting here between the plaintiff and the defendant, the

* Second Appeal, No. 766 of 1896.

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English rule embodied in that section, that a general occupation is an occupation from year to year would go for to support the contention for the plaintiff. But there is a very material difference between the relation of landlord and tenant in England and that of a zemindar and a ryot or cultivating proprietor, or, to speak more accurately, the person in whom, with reference to Government or its assignees, the right to occupy the soil for purposes of cultivation is to be taken as vested.

[301] Now a tenant, of course, derives his right from the landlord; and in the case of a person thus acquiring his title, the rule referred to is unquestionably a most equitable rule. For the theory as to the relation of landlord and tenant in England led to the view that, in the absence of proof to the contrary, every tenancy was to be taken to be a tenancy at will. In fact, such was the rule until the Judges altered it and laid down that general tenancies should be presumed to be, not tenancies at will, but tenancies from year to year; as was explained in *Doe* v. *Porter* (1), where Lord Kenyon pointed out that a tenancy from year to year succeeded to the old tenancy at will, which was attended with many inconveniences, and, in order to obviate them, the Courts very early raised an implied contract for a year and added that a tenant could not be removed at the end of the year unless he had received six months' previous notice, see *Doe d. Martin* v. *Watts* (2). But sound and reasonable as this rule would be, it applied to cases in which the right of a defendant in possession is derived in a manner similar to that of a tenant in England, it cannot, on principle, be extended to cases in which the defendant's right is not so derived. Now, there is absolutely no ground for laying down that the rights of ryots in zemindaries invariably or even generally had their origin in express or implied grants made by the zemindar. The view that, in the large majority of instances, it originated otherwise is the one most in accord with the history of agricultural land-holding in this country. For, in the first place, sovereigns, ancient or modern, did not here set up more than a right to a share of the produce raised by raiyats in lands cultivated by them, however much that share varied at different times. And, in the language of the Board of Revenue which long after the Permanent Settlement Regulations were passed, investigated and reported upon the nature of the rights of ryots in the various parts of the Presidency, "whether rendered in service, in money or in "kind and whether paid to rajas, jagirdars, zemindars, poligars, "mutadars, shrotriemdars, inamdars or to Government officers, such "as tahsildars, amildars, amins or thannadars, the payments which "have always been made are universally deemed the due of Govern-"ment." (See the Proceedings of the Board of Revenue, dated 5th January 1818, quoted in the note at page 223 of Dewan Bahadur Srinivasa [302] Raghava Ayyangar's 'Progress in the Madras Presidency;' See also paragraphs 75 to 78 of the exhaustive observations of the Board as to the relative rights of zamindars and raiyats in the Board's Proceedings of the 2nd December 1864 appended to the second report of the Select Committee on the Rent Recovery Bill, 1864, V. Madras Revenue Register at Page 153.) Therefore to treat such a payment by cultivators to zemindars as 'rent' in the strict sense of the term and to imply therefrom the relation of landlord and tenant so as to let in the presumption of law that a tenancy in general is one from year to year, would be to introduce a mischievous fiction destructive of the rights of great numbers of the cultivating

(1) 3 T.R. 13. (2) 7 T.R. 83.

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classes in this province who have held possession of their lands for generations and generations. In support of the view that there is no substantial analogy between an English tenant and an Indian ryot it is enough to cite the high authority of Sir Thomas Munro. Writing in 1824, he observes: "the raiyat is certainly not like the landlord of England, but neither is he like the English tenant" (Arbuthnot's 'Selections from the Minutes of Sir T. Munro,' Vol. I, Page 234.) And why is this so? It is for the simple reason that the rights of raiyats came into existence mostly, not under any letting by the Government of the day or its assignees, the zamindars, &c., but independently of them. According to the best Native authorities, such rights were generally acquired by cultivators entering upon land, improving it, and making it productive. As observed by Turner, C.J., and Muttusami Ayyar, J., in *Siva Subramanya* v. *The Secretary of State for India*(1), "Menu and other "Hindu writers have rested private property on occupation as owner." And in *Secretary of State* v. *Vira Rayan* (2) the same learned Judges pointed out "according to what may be termed the Hindu common law, a "right to the possession of land is acquired by the first person who makes "a beneficial use of the soil." Hence the well-known division in these parts of the great interests in land under two main heads of the *melvaram* interest and the *kudivaram* interest. Hence also the view that the holder of the *kudivaram* right, far from being a tenant of the holder of the *melvaram* right, is a co owner with him. Sir T. Munro puts this very clearly. He says: "A raiyat divides with Government all the rights of the land. "Whatever is not reserved by Government belongs to him. **[303]** He is "not a tenant at will or for a term of years. He is not removable, "because another offers more" (Arbuthnot's 'Selections from the Minutes of Sir T. Munro,' Vol. I, page, 234; see also *Ibid*, page 253). No doubt, the view of the majority of the Judges (Morgan, C.J., and Holloway, J., Innes, J., dissenting) in *Fakir Muhammad* v. *Tirumala Chariar*(3) was different. But in *Secretary of State for India* v. *Nunja*(4), Turner, C.J., and Muttusami Ayyar, J., stated that they saw strong reason to doubt whether the view of the majority in that case was right,

It thus seems unquestionable that *prima facie* a zamindar and a raiyat are holders of the *melvaram* and *kudivaram* rights, respectively. When, therefore, the former sues to eject the latter, it is difficult to see why the defendant in such a case should be treated otherwise than defendants in possession are generally treated, by being called upon, in the first instance, to prove that they have a right to continue in possession. One can see no other reason for making such a difference than that certain legislative enactments, especially those passed at the beginning of the century, refer to raiyats as tenants and to the payments made by them as rents. But considering that those enactments were intended for particular purposes and considering that Regulation IV of 1822 expressly declares that the actual rights of any of the land-holding classes were not intended to be affected by the earlier regulations, the phraseology of those enactments should not be taken to operate to the prejudice of persons between whom and zamindars the *prima facie* relation is only that between the holder of the *kudivaram* right and the holder of the *melvaram* right in a given piece of land as shown above. Consequently it is obvious that, in a suit like the present, the zamindar should start the case by evidence of his title to eject. In other words, he has to prove that the *kudivaram* right in the disputed

(1) 9 M. 285. (2) 9 M. 175. (3) 1 M, 205. (4) 5 M. 163.

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land had been vested in him or his predecessors and that the land subsequently passed to the defendant or some person through whom he claims under circumstances which give the plaintiff a right to eject. This is clear from *Srinivasa Chetty* v. *Nanjunda Chetty*(1). See also *Appa Rau* v. *Subbanna*(2) and *Venkatacharlu* v. *Kondappa*(3). In the first mentioned case Muttusami Aiyar and Tarrant, JJ., said : "But [304] Viraman's (the "then defendant's) tenancy has been found to be that of an ordinary pat-"tadar, and we apprehend that such a tenancy, when there is no evi-"dence of a contract as to its origin and duration, or that the *kudivaram* "right vested in the mitttadar (the then plaintiff) at any time, entitles "the tenant to the right of occupancy for the purpose of cultivation de-"terminable on the conditions prescribed by (Madras) Act VIII of 1865." The contention that the raiyat was merely a tenant from year to year was distinctly raised in the above case,but was virtually, if not expressly, overruled. We must likewise decline to accept the similar contention urged here on behalf of the plaintiff. It may, perhaps, be asked what is the nature of the holding of persons in the position of the defendant in the lands they hold, if they are not tenants from year to year. There can be no hesitation in replying to this question that in essence there is no difference between a raiyat holding lands in a zamindary village and one holding lands in a Government village (Arbuthnut's 'Selections from the Minutes Sir T. Munro,' Vol. I, p. 254), and like the latter raiyat the former raiyat in the absence of proof of contract or of special or local usage to the contrary, is entitled to occupy his lands so long as he pays what is due, and if he should commit any default in this or other respect, until he is evicted by the processes provided by law.

The decree of the Lower Appellate Court is right; the second appeal fails and is dismissed with costs.

The memorandum of objections is also dismissed with costs.

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20 M. 305.

## [305] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

KRISHNA MENON (*Plaintiff*), *Appellant v.* KESAVAN AND OTHERS (*Defendants*), *Respondents*.* [15th, 16th, 17th, 18th March and 29th April, 1897.]

*Limitation Act—Act XV of* 1877, *Section* 28, *Schedule II, Article* 10—*Civil Procedure Code—Act XIV of* 1882, *Section* 214 —*Right of pre-emption asserted by one in possession under an otti mortgage in Malabar.*

Land in Malabar was in the possession of the defendants and was held by them as otti mortgagees under instruments, executed in August 1873 and January 1876. The plaintiff having purchased the jenm right under instruments executed and registered in May and June 1877, now sued in 1893 for redemption:

*Held*, that the defendants' right of pre-emption was not extinguished under Limitation Act, Section 28, and that they were not precluded from asserting it by Article 10 owing to the lapse of time, and that Civil Procedure Code, Section 214, was inapplicable to the case, because the persons asserting a right of pre-emption were in possession.

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* Appeal No. 33 of 1896.

(1) 4 M. 174. (2) 13 M. 60. (3) 15 M. 95.

[R., 24 M. 449 (457); 29 M. 336 (341) = 1 M.L.T. 153; 30 M. 388 (392) = 17 M.L.J. 329 (332) = 2 M.L.T. 354; 6 C.W N. 601 (610); 17 Ind. Cas. 337 (338) = 23 M.L.J. 607 (608) = 12 M.L.T. 535 = (1912) M.W.N. 1217 (1219).]

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20 M. 305.

APPEAL against the decree of E. K. Krishnan, Subordinate Judge of Palghat, in original suit No. 31 of 1893.

Suit brought to redeem an otti mortgage. The facts of the case were as follows:—

"The 45 parcels of land in suit belonged to the Naduvakat tarwad "(the members of which have since been made parties to the suit as "defendants Nos. 36 to 63). Nos. 1 to 21 were passed by Naduvakat "Kunjunni Nair to the first defendant on a panayom of Rs. 7,000 under "a deed, dated 16th August 1873, and Nos. 22 to 45 under a similar "deed, dated 26th January 1876. The defendants Nos. 2 to 11 are mem-"bers of the first defendant's illom. Under two deeds, dated 14th May "1877 and 10th June 1877, the plaintiff purchased jenm title to the plaint "lands excepting Nos. 19 and 21 from the Naduvakat tarwad."

The mortgagees asserted their right of pre-emption, and on this ground, among others, resisted the plaintiff's suit to redeem.

The Subordinate Judge dismissed the suit.

Plaintiff appealed.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*), *Sankaran Nayar* and *Raman Menon*, for appellant.

[306] *Sundara Ayyar*, for respondents Nos. 4 and 6.

## ORDER.

The plaintiff, as the purchaser of the jenm right in a number of plots of land including those in suit under Exhibit B, dated 14th May, and Exhibit C, dated 10th June 1877, sues to redeem from the defendants those held by them on mortgage under Exhibits I and II, dated 6th August 1873 and 26th January 1876, respectively. In the Court below the parties were at issue, as to whether the mortgages were such as, according to the usage of Malabar, carried with them the right of pre-emption. But that is no longer disputed.

The principal question for determination is whether the defendants are precluded from asserting their right of pre-emption for all or any of the reasons urged on behalf of the plaintiff.

First, Exhibits A and III, executed on the 10th June 1877 by the plaintiff and the first defendant, are relied on on behalf of the plaintiff as disentitling the defendants from insisting upon the right in question. Exhibit III is only a counterpart of Exhibit A. After reciting the above-mentioned mortgages to the defendants and the purchase of the jenm right by the plaintiff, the documents merely state that on the one part the first defendant agreed to receive in January-February 1878 from the plaintiff Rs. 17,000 due to him and the value of improvements at certain specified rates and to surrender the mortgaged property, and on the other part the plaintiff agreed to pay the mortgage amount and the value of improvements when the first defendant surrenders the lands. The plaintiff's case is that there were disputes between himself on the one side and the first defendant and his deceased younger brother Thuppan Nambudri on the other in respect of the actual amount due under Exhibits I and II, as also about the period for which the defendants were entitled to hold the lands and that Exhibits A and III were executed in settlement of those disputes.

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The defendants' case is as follows:—No disputes existed, and no settlement was made as alleged for the plaintiff. But the plaintiff had entered into an agreement with his vendors to advance funds for carrying on certain litigation connected with the alienation of their family property made by their Karnavan, the consideration being that the plaintiff was to receive a share of the property. The sale-deeds B and C were executed in pursuance of the said arrangement. The plaintiff anticipated difficulties in getting the [307] tenants in possession of the lands purchased to recognize the sales. On the day Exhibits A and III were executed, the plaintiff informed the first defendant that if the latter (he being the holder of a considerable portion of the lands) signed a document like those in question, that would facilitate the plaintiff getting other tenants to recognize the plaintiff's purchase. The plaintiff distinctly assured the defendant that nothing would be done under the documents to the prejudice of the defendants' rights to the lands held by them, and the defendants' family would not be deprived of the possession thereof especially as they were situated right in front of their family house and therefore of special value to them. Relying upon such representation the first defendant signed the documents in question. The story told by the four witnesses, who support the version put forward on behalf of the plaintiff, is that, on the morning of the 10th June 1877, the first defendant, and his deceased brother Thuppan, of their own accord, met the plaintiff who was then staying in one Malliseri Nambudri's house and that the plaintiff, who had been till then contending that no more than Rs. 8,000 were due to the defendants, was induced by the plaintiff's second witness to agree to pay the whole amount and Exhibits A and III were executed then and there. The Sub-Judge did not believe these witnesses. None of them is independent and the story itself in some material details is not very probable. In agreeing with the Sub-Judge's view that the evidence is not reliable, it is sufficient to advert to a few circumstances which throw discredit upon the testimony. Now, a very material part of the story told by the plaintiff's witnesses is that Exhibit C was executed in the same place and about the same time as Exhibits A and III. This is put forward obviously for the purpose of making the alleged settlement of disputes between the plaintiff and the defendant look a little probable inasmuch as in Exhibit C, not only the validity but the reality also, of the debt of Rs. 10,000 due to the defendant under Exhibit II is denied. But notwithstanding that the documents bear the same date, *viz.*, 10th June 1877, it is certain that Exhibit C was not executed as alleged by the witnesses who support the plaintiff. This is directly proved by another of his witnesses, *viz.*, Nilukutti, an executant of Exhibit C. For she says it was executed not in Malliseri Nambudri's house but in Naduvakat house, the residence of the vendors. Next some of the provisions in Exhibit C itself point to the same conclusion. For, as already stated, the mortgage for Rs. 10,000, Exhibit II, [308] was questioned in Exhibit C; yet the evidence of the witnesses supporting the plaintiff implies that all disputes between the parties had been settled before Exhibit C was executed. What necessity was there, then, for inserting in Exhibit C an elaborate protest against the debt which the plaintiff had, according to his witnesses, just then agreed to treat as perfectly good and valid? The clear inference is that Exhibit C had come into existence before Exhibits A and III, which were antedated as stated by the defendant, and that the present story that all were executed about the same time in the Malliseri house is false. Again in consenting, as the witnesses say, to pay so large a sum as Rs. 10,000 over and above what he supposed to have been really

due, the plaintiff would surely have insisted upon an explicit statement being made in A and III, that the right of pre-emption possessed by the defendant was waived. Not only is that not the case but strangely enough the witnesses do not even say that the slightest allusion to the subject was made during the negotiations for the settlement of the disputes or at the settlement.

Lastly, though the first defendant was the senior member in his family, the evidence abundantly shows that the actual manager was the deceased Thuppan. It is said that this man was present at the execution of Exhibits A and III. Why then was his attestation at least not secured? It is impossible to believe that so shrewd a man as the plaintiff would have failed to secure such evidence of Thuppan's assent, if Thuppan was really there. These few circumstances are enough to show that the witnesses supporting the plaintiff's case are not truthful. Turning to the evidence in support of the defence, the first defendant was examined as the first witness in the suit on behalf of the plaintiff himself, and distinctly supported the defence. The plaintiff had thus the fullest opportunity to contradict the defendant's statements, but he abstained from going into the box. There is, therefore, no good reason to question the uncontradicted evidence of the defendant supported as it is by that of his sixth witness, who also is an apparently trustworthy witness, and considering the position of the parties at the time the defendants' account is not improbable. The first defendant was then comparatively young about 25 or 26 years of age and, as his deposition shows, inexperienced in business. The plaintiff however occupied the important position of a Sub-Judge (though he was not then employed as such) in the very district where the defendant was a resident. The representations and assurances given by a person of the [309] plaintiff's circumstances in life to one in the first defendant's position would not have then appeared necessarily fraudulent. The informal character of Exhibits A and III, each of which is self-styled a 'Memorandum,' coupled with the fact that no schedule of property was originally attached to the documents, would have made the plaintiff's statement that he did not intend to get the documents registered wear an appearance of truth, and naturally would have led the defendant to believe that the documents were meant to be used only for the purpose of facilitating plaintiff's dealing with the other tenants. We must therefore find upon this point in favour of the defendants and hold that they are not precluded by Exhibits A and III from setting up their right of pre-emption. The second contention was that the defendants having failed to sue to enforce their right within the year prescribed by Article 10 of the Limitation Act, the right was extinguished under Section 28 of that enactment and could not therefore be set up as a defence in the suit. This contention is unsustainable. Now the defendants as 'otti' mortgagees have since the dates of the mortgages admittedly held possession of the lands to which the right of pre-emption attaches. If the defendants had as *plaintiffs* to enforce their right of pre-emption, it was absolutely unnecessary for them to pray for any possession. All they could have claimed was a decree directing that, on payment of the proper price, the right to redeem which the jenmis had and of which the plaintiff had become the assignee, be transferred to them.

But a mere right to redeem is not capable of possession within the meaning of Section 28. That section contemplates suits, which a person who is kept out of property, admitting of physical possession, could have brought for such possession. It is true that the language employed in some of the decided cases in describing the nature of

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the right to redeem is not quite uniform. For example in *Chathu* v. *Aku* (1) it was stated to be a right of action only, while the leading case of *Casburne* v. *Scarfe* (2) lays down perhaps more correctly that the right was not a mere right of action, but an estate in the land. Nevertheless in a case like this, where the mortgage in a measure partakes of the nature of a lease, even an English lawyer would, in accurate modern technical language, only say the mortgagor was *seized of the right to redeem* while the mortgagee was in *possession of* [310] *the land.* Compare 'Pollock and Wright on Possession,' page 47, where it is pointed out that where a tenant occupies a close under a lease for years, the tenant has possession of the close, so that not only a stranger but the free holder himself may be guilty of a trespass against him, but the free-holder is still seized of the free-hold. It is thus clear, apart from authority, that the right in question is not capable of possession within the meaning of Section 28, and that the extinctive prescription referred to therein is inapplicable in the present instance. And *Chathu* v. *Aku* (1) already cited and *Kanharankutti* v. *Uthotti* (3) are clear authorities on the point. In the former case, it was held that where the equity of redemption of a certain estate became on the death of the mortgagor the property of two divided branches of a Malabar tarwad, and the rents and profits of the land paid by the mortgagee were enjoyed by the representative of one branch for fifteen years to the exclusion of the other branch, such enjoyment was not adverse possession within the meaning of Section 28. In the second case cited above, Handley and Weir, JJ., dealt with a contention similar to the present thus: "But "Section 28 only applies to suits for possession of property, third defend- "ant has no need to bring any suit for possession of the property in "question. He has already obtained a decree for such possession. The "only suit he would have to bring to assert his right of pre-emption "would be a suit to set aside the sale to the plaintiff and the first and "second defendants and to compel them to convey the property to him "on his paying the price they had paid, and even if such a suit is "barred, the right is not extinguished by Section 28."

Section 214 of the Civil Procedure Code was strongly relied on on behalf of the plaintiff. But that section contemplates cases where the party seeking to enforce a right of pre-emption is out of possession, and consequently it is inapplicable to instances like the present in which parties setting up such a right are already in possession. And it is to be borne in mind that the form of the decree to be given in the latter class of cases is not what is mentioned in Section 214 relied on, but that adopted in *Ukku* v. *Kutti* (4).

The third contention was that, even if the right was not extinguished under Section 28, yet, as it became barred under [311] Article 10 on the expiry of a year from the registration of Exhibits B and C, the right cannot be urged by way of defence. This contention is manifestly untenable. For, if, notwithstanding that an otti mortgagee's right to sue to enforce his right of pre-emption has become barred, that right of pre-emption, owing to the inapplicability of Section 28 to the case, is still unextinguished, it is difficult to see on what principle such right is to be held to be unavailable by way of defence. That there is nothing in the Limitation Act to support the present contention of the appellant is fully and clearly pointed out by the learned Chief Justice and Shephard, J., in

(1) 7 M. 26. (2) 2 W. & T.L.C. 1035. (3) 13 M. 490. (4) 15 M. 401.

*Orr* v. *Sundra Pandia* (1). In the Privy Council case in *Janki Kunwar* v. *Ajit Singh* (2) and the other similar cases cited for the plaintiff the parties affected by the law of limitation were out of possession, and these authorities are, therefore, not in point here.

The fourth and last contention was that the defendants should be held to have waived their right by long delay and inaction. But this contention is not supported by the facts of the case. Exhibit 53 shows that, so far back as 1878, the defendants openly repudiated the plaintiff's right under his purchase; and this circumstance is totally inconsistent with any intention on the part of the defendants to give up their right in favour of the plaintiff. As to Exhibit A.T., the karar, which was executed in 1891 between the members of the first defendant's family and which was relied on as supporting the above contention, it is clearly against it. For the document distinctly provides that any claim that might be preferred in respect of the redemption of the lands in question should be resisted, and certainly one ground upon which such resistance could have been based was their right of pre-emption.

Lastly under Exhibit II, some rent was payable though the amount was very small. But the defendants never paid any of this rent to the plaintiff. These circumstances apart, how could the defendants be held to have waived their right by mere inaction and delay, they being in possession and the price payable in respect of the lands in question not having been ascertained and fixed at any time? It is scarcely necessary to say that the ascertainment of the price is an essential preliminary to the defendant being put to their election—see *Cheria Krishnan* v. *Vishnu* (3). [312] Now, in the first place, it is admitted that, before the plaintiff concluded the sales he relies on, neither he nor his vendors called upon the defendants to exercise their option to buy. In the next place, the plaintiff purchased under Exhibits B and C, not only the lands under mortgage to the defendants but others also for two lump sums. It is not alleged that any agreement was entered into between the plaintiff and his vendors as to how much of those lump sums was to be taken as the proportionate price for the lands in question, and subsequent to his purchases the plaintiff did not make any proposal to the defendants as to the proportionate price or require *them* to make an offer on the point. Nor was any step taken for obtaining an adjudication by the Court of the amount which the defendants would have to pay if they decided to buy. In these circumstances the defendants were not bound to move in the matter unless called upon to do so by some act of the plaintiff; subsequent to his purchase and in the absence of any such act, they were entitled to await the demand for surrender of the property, and then assert their right of pre-emption. Consequently no presumption of waiver could be raised on the ground of delay and inaction in this case.

For the above reasons, we must hold that the defendants are entitled to rely on their right of pre-emption. But before a proper decree can be passed, it is necessary to determine what the proportionate price payable by the defendants Nos. 1 to 11 is. We therefore call upon the Sub-Judge to submit a finding on the point within two months after the recess. Fresh evidence may be taken on either side. The Sub-Judge should also submit a finding on the eighth issue on the evidence on record. Seven days will be allowed for filing objections after the findings have been posted up in this Court.

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(1) 17 M. 255. (2) 15 C. 58. (3) 5 M. 198.

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## [313] APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Davies.*

THIRUKUMARESAN CHETTI AND ANOTHER (*Plaintiffs*), *Appellants v.* SUBBARAYA CHETTI AND OTHERS (*Defendants*), *Respondents.** [25th August and 3rd September, 1895, and 24th February, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Section* 215—*Decree for account of dissolved partnership—Taking of accounts.*

In a suit for an account of a dissolved partnership a decree should be passed under Civil Procedure Code, Section 215, in accordance with Form No. 132 in Schedule IV; and it should direct an account to be taken of the dealings and transactions between the parties and of the credits, property and effects due and belonging to the late partnership, and it should direct the appointment of a receiver of the outstanding debts and effects.

Observations on the procedure to be adopted and the burden of proof on the taking of the account.

[**R.**, 25 M. 244 (297) (**F.B.**); 23 P.R. 1903=77 P.L.R. 1903; **D.**, 3 A.L.J. 233=A.W.N. (1906) 111].

APPEAL against the decree of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, in original suit No. 56 of 1890.

The following statement of facts is taken from the judgment of Subordinate Judge:—

The parties to this suit were partners in trade of a native firm of merchants, who owned and kept three shops, one here at Kumbakonam and the other two at Udayarpalaiyam, for purchasing and selling cloths and twist; that kept at Kumbakonam was under the management of the plaintiffs' father and son and the second defendant, while the other defendants managed those kept at Udayarpalaiyam. The partnership was first formed on the 30th September 1877 between the first plaintiff and the defendants Nos. 1 and 3 only under certain terms and conditions, and the second plaintiff and defendants Nos. 2 and 4 were subsequently taken into the partnership. There were settlements of account amongst the partners on more than one occasion, and the last was made on the 11th January 1889; and differences having arisen amongst them at the time, it was resolved that they should abide by the decision of one Chockalinga Chetti and others, and that the accounts of the firm should be kept locked up in the bazaar at Kumbakonam, and that pending their decision, the business of their shops were also stopped.

**[314]** The defendants answered that there was a complete and final settlement of accounts amongst the partners on the 30th November 1888, answering to 17th Kartigai of Sarvadhari, and that the plaintiffs, who owed first defendant under that settlement Rs. 567-7-2¾ and promised to pay the amount soon, also retired from the partnership after this settlement; and they had, therefore, no right to sue for an account or ask for a share of the profits in the subsequent business carried on by themselves.

On the 7th October 1891, when the suit was brought on for examination of witnesses after one or two postponements of the hearing, the first defendant was placed in the box and examined by the defendants

* Appeal No. 67 of 1894.

themselves. After his examination was partially made, on the following day both parties expressed a desire to settle their disputes out of Court and wanted a day's time for consideration; it was granted, and on the 9th of October they made up their differences as regards the shares to be allotted to each partner and the first defendant also agreed to withdraw his suit No. 5 of 1891, and consented to a fresh and proper settlement of accounts being made starting from the settlement made amongst themselves in the year Parthiva (1885) and ending with the 27th Margali of Sarvadhari (9th January 1889). They also agreed that the plaintiffs should have nothing to do with the new business carried on by themselves after this last date.

The parties first tried to avoid the expenses of a commission and promised to look into their accounts themselves and submit to Court abstract accounts of their assets and liabilities. But as it was found that even after three weeks nothing could be done by them, the Court ~~decided~~ on the 30th October 1891 upon appointing a pleader of the High Court as a Commissioner for the conduct of this investigation, and directed the parties to appear before him with their accounts and assist him in all possible manner. This investigation was not finished till shortly before the 4th January 1892, when his report accompanied by explanatory statements were received.

The Subordinate Judge passed the following decree :—

"The Court doth order and decree that defendants Nos. 1 to 3 as also "defendants Nos. 5 to 7 as the heirs of fourth defendant, deceased, do "pay plaintiffs Rs. 2,647-9-11 with interest thereon at six per cent. per "annum from 26th Margali of Sarvadhari (9th January 1889) up to the "date of plaint *i.e.*, 7th November 1890, [315] amounting to Rs. 299-2-0 "and also subsequently up to the date of realization with proportionate "costs; that the outstandings not realized, as per schedule annexed hereto including the sum owed by the first plaintiff's son-in-law, when realized, be distributed, amongst the partners as follow: for plaintiffs 1½, for "defendants Nos. 1 and 22, for third defendant 1, and for the fourth defendant's heirs, the defendants Nos. 5 to 7, ¾, and plaintiffs be given 1½ out "of 5¼ shares; that they be either sold in auction amongst the plaintiffs "and defendants themselves and the assets ascertained, or a receiver "appointed and directed to realize the same, as may seem desirable at the "time of the execution of the decree, and that the defendants do bear their "costs including the full costs of the first commission and a moiety of the "second."

Plaintiffs appealed.

*R. Subramania Ayyar*, for appellants.

*Mahadeva Ayyar*, for respondents.

## JUDGMENT (PRELIMINARY).

This is a suit brought by two of the partners of a firm against the remainder for an account of the partnership business. The partnership was dissolved before the date of the suit. Although, in the first instance, certain issues were raised, those issues were not tried, and, in the result, nothing remained except to take an account. Under these circumstances, the proper course for the Judge to have adopted was to pass a decree under the 215th Section of the Code of Civil Procedure, in accordance with the form given in the schedule. The decree should have directed an account to be taken of all dealings and transactions between the partners, between the dates agreed upon by them, *viz.*, the date of the settlement

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in Parthiva and the 27th Margali (9th January 1889), and also an account of the credits, property and effects due and belonging to the partnership; and further it should have directed the appointment of a receiver of the outstanding debts and effects (see Daniell's 'Chancery Practice,' Chapter xxi, Section 10, and *Ram Chunder Shaha* v. *Manick Chunder Banikya* (1)). Some of the directions, which are given in the actual decree, while finding a proper place in a preliminary decree, are most inappropriate in a final decree. The preliminary decree being drawn up, the next step was for the Court either to take the account itself or to appoint a Commissioner. A Commissioner was appointed and the usual directions were given him. [316] The course taken by the Commissioner, as far as can be gathered from his report, was not, however, the convenient and proper one. Having found that the business at Udayarpalaiyam was conducted entirely by the defendants, he ought to have called upon them to render an account, and not merely to give up their books for examination. When this was done, the plaintiffs would have been in a position to make their charges—which, of course, opportunity should have been given to the defendants to meet. In all the steps taken, the statements made by either party ought to be supported either by affidavit or by evidence duly taken. Instead of pursuing this course, the Commissioner, after some examination of the defendants' books, seems to have called upon the plaintiffs to make charges against the defendants, and then proceeded to consider whether those charges were substantiated. By this procedure, the plaintiffs must have been seriously prejudiced, for the burden was cast upon them; whereas the burden of discharging themselves ought to have been cast on the defendants. For instance, with regard to the debts said to be due to the firm, which form one of the subjects of appeal, there does not seem to be any account verified by the defendants showing what amount remained uncollected. The Commissioner gives no particulars (p. 48, para. 22 of the book of documents). The Subordinate Judge dealing with the matter in paragraph 73 of this judgment observes that the plaintiffs have no proof of the defendants having collected more than Rs. 27,757-2-6. He does not say that the defendants swear they had not collected the balance of Rs. 5,505-2-1, still less that they explained why they had not done so, although, in the circumstances of the case, they ought to have been called upon for such explanation. The defendants' Vakil was unable to refer us to any evidence on the point. It was apparently in consequence of the unsystematic mode of inquiry adopted by the Commissioner that the Judge had to refer the accounts to another Commissioner, as explained by him in paragraph 53. The point on which this reference was made is the most important point raised in the appeal. It relates to the sum of Rs. 12,515-13-6, representing the value of twist sent from Kumbakonam to the Udayarpalaiyam shop. The accounts of the latter shop were, it is admitted, kept entirely by the defendants, under whose control the business was.

This matter again the Subordinate Judge deals with, as if a charge of misappropriation had to be proved by the plaintiffs; [317] whereas it was for the defendants to explain what had become of the twist. The plaintiffs took exception in March to the manner in which the Commissioner had, in his report of January 1892, dealt with the matter, consequently another Commission was issued. The second Commissioner does not pretend to have disposed of the matter finally, for he says "the

(1) 7 C. 428.

"better way would have been to take an account of all receipts of twists "from Kumbakonam as given in the Palliam accounts and to take a "similar account of all debits of twists to the Palliam shop, as stated in "the Kumbakonam accounts and then to compare one with the other." This course was not adopted, and what is more important the defendants have, as far as we can learn, never vouchsafed any explanation. The explanation given by the Subordinate Judge in the 59th paragraph of his judgment may be well founded; but, as it stands, it is no more than a suggestion based on no evidence to which we are referred.

As regards the next item—the Rs. 1,000 mentioned in paragraph 67 of the judgment—we see no reason to differ from the Subordinate Judge. Nor do we see any reason to differ as to the finding in the next paragraph to which objection was taken on behalf of the respondents.

With regard to the sum of Rs. 139-7-6 (paragraphs 41 and 42), it seems to us that the question is whether the plaintiffs or the defendants were in a position to recover the money. It is said that the decree is in the name or under the control of the defendants and that they never put the plaintiffs in a position to recover the money. If this is so, the plaintiffs ought not to be debited with it. There must be an inquiry on that head.

The last question relates to interest. The Subordinate Judge has dealt with this question in a rough and ready way. Since, however, it is found that the rate contracted for was generally 12 per cent. per annum, it was for the defendants to prove that a lessor rate had been paid. Here again we find the inconvenience of having no account rendered by the defendants and supported by their affirmation. There must be a proper inquiry with regard to this claim.

It is somewhat difficult to say what should be done with the decree framed by the Subordinate Judge, which cannot be allowed to stand as a final decree. It appears to us best to treat it as a preliminary decree and to have a final decree drawn up, when the inquiries yet to be made have been completed and the out-**[318]** standings have been collected by the receiver. We must direct the Subordinate Judge to return findings on the following questions :—

1. Whether the defendants have duly accounted for the twist sent from Kumbakonam to Udayarpalaiyam, and, if not, what sum should be debited against them in respect thereof?

2. Whether the sum of Rs. 5,505-2-1 was, in fact, collected by the defendants, or could, with reasonable diligence on their part, have been collected by them?

3. Whether the plaintiffs were put in a position to recover the sum of Rs. 139-7-6?

4. Whether in respect of any and what debts collected by the defendants, any and what remission of interest was properly made by them and what fair sum (if any) should be debited against them accordingly?

Fresh evidence may be adduced on either side.

The findings are to be submitted within six weeks from the date of the receipt of this order, and seven days will be allowed for filing objections, after the findings have been posted up in this Court.

This appeal coming on again for hearing after the return of the findings upon the issues, referred by this Court for trial, the Court made the ollowing :—

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## ORDER.

Objections are taken to the findings on all the issues. As to the second, third and fourth issues, we are not prepared to disagree with the Subordinate Judge. The finding on the second issue, we must, however, observe, is not so clear as might be desired. It was for the defendants to explain why they did not collect the outstandings which were recoverable at the date of the dissolution. The Subordinate Judge does not say distinctly that he accepts the explanation given, but we must take it that he meant to do so. As to the first issue, the finding is unsatisfactory. The question still in doubt is as to what quantity of twist the defendants received at Udayarpalaiyam from Kumbakonam. The defendants admit that their own books are incomplete as to these receipts, being complete only as to the sales effected by them and the receipts from other places.

The quantity sent from Kumbakonam must be within the knowledge of the plaintiffs and as they are not satisfied with the defendants' account, they must themselves state from such materials as are available what quantities of twist were supplied from Kumbakonam from the 17th July 1885 till the 9th January 1889.

**[319]** Having done this, plaintiffs must go on to show what is the difference, if any, to be accounted for by the defendants.

The account must be filed in this Court within two months. Two weeks allowed to the defendants to take objection. Parties to have access to the books.

This appeal coming on for hearing after the submission of the accounts, &c., the Court delivered the following :—

## JUDGMENT (FINAL).

Nothing in the shape of an intelligible account is put before us. The plaintiffs, therefore, not having taken advantage of the opportunity given them, we must accept the finding so far as regards the matter of the first issue. The decree must be modified in accordance with the finding of the Subordinate Judge in paragraph 29. Subject to this, the appeal is dismissed with costs.

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**20 M. 319=7 M.L.J. 257.**

## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Davies.*

VENKATRAMAYYA AND OTHERS (*Defendants*), *Appellants v.* KRISHNAYYA (*Plaintiff*), *Respondent.**
[6th and 25th August, 1897.]

*Court Fees Act —Act VII of* 1870, *Sections* 6, 28—*Civil Procedure Code—Act XIV of* 1882, *Section* 54—*Presentation of plaint improperly stamped.*

A suit is not instituted, within the meaning of the explanation to Section 4 of the Limitation Act by the presentation of a document purporting to be a plaint, if that document, while not undervaluing the claim, is written on paper that does not bear the proper Court fee.

[**Diss.**, 32 M. 305 (311)=1 Ind. Cas. 507=6 M.L.T. 129 (132); 74 P. R. 1903; **R.**, 189 P.L.R. 1900; **D.**, 27 C. 814 (820); 22 M. 494 (501)=9 M.L.J. 37 (43); 24 M. 331 (334).]

* Second Appeal No. 1360 of 1896.

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20 M. 319=
7 M.L.J. 257.

Second appeal against the decree of F. H. Hamnett, District Judge of Kistna, in appeal suit No. 279 of 1894, reversing the decree of N. Somayajulu Sastri, District Munsif of Gudivada, in original suit No. 114 of 1893.

Suit to recover Rs. 205-7-3, the principal and interest due on a registered mortgage bond. The cause of action accrued on the 29th March 1881, and the plaint was filed on the 29th March 1893. The proper Court fee was Rs. 15-12-0, but the plaint was stamped with a stamp of As. 12. On the 30th March the plaint was returned to be represented with the proper stamp [320] within seven days and was re-presented within the time allowed. No explanation appears to have been given at any stage of the suit why the plaint was stamped with only a 12-anna stamp.

One of the issues raised in the suit was "whether the suit is barred, "the plaint not having been properly stamped on 29th March 1893."

The District Munsif held that the suit was barred and dismissed the plaintiff's claim, but the District Judge on appeal reversed the Munsif's decree and gave a decree for a portion of the plaintiff's claim.

The defendants appealed.

*Sriramulu Sastri*, for appellants.

*Venkatarama Sarma*, for respondent.

## JUDGMENT.

Shephard, J.—The question is whether the plaint, having been presented with an insufficient Court-fee stamp on the last day allowed by the law of limitation, *viz.*, the 29th March 1893, and subsequently within the time fixed by the Court presented again with a proper stamp, can be said to have been duly presented within the time limited by the Act of Limitation. According to the 4th Section of that Act, a suit is instituted when the plaint is presented to the proper officer, and unless the suit is so instituted within the period prescribed by the schedule, it must be dismissed. This suit, therefore, ought to have been dismissed, if, in point of law, there was no plaint presented on the 29th March 1893. The document presented as a plaint satisfied the requirements of the Civil Procedure Code, but it did not satisfy the requirements of the Court Fees Act, inasmuch as the stamp affixed was 12 annas when it ought to have been Rs. 15-12-0. That being the case, it was a document which, in view of the provisions of Section 6 of the Court Fees Act, could not lawfully have been filed by the Court to which it was presented. Moreover, it was a document which, according to the 28th Section of the same Act, possessed no validity. The Act not only imposes a restriction or disability on the Court with reference to an inadequately stamped document. It also, by declaring the invalidity of such document, makes the proper stamping of a document purporting to be a plaint an essential condition of the existence of a valid plaint. In other words, a plaint inadequately stamped is, in point of law, no plaint at all. I can find nothing in Section 54 of the Civil Procedure Code to conflict with this view of the law. We are not concerned with the case of improper valuation, the case contemplated in [321] Clause (*a*) of Section 54 of the Civil Procedure Code and Sections 9 and 10 of the Court Fees Act. Nor are we concerned with the case of mistake or inadvertence on the part of the Court—the case to which the proviso to Section 28 of the latter Act is applicable. The case before us is the one provided for in Clause (*b*) of Section 54 of the Civil Procedure Code. The object of that clause is to give the party who has presented

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a defectively stamped plaint an opportunity of supplying the defect. Instead of rejecting the plaint the Court must fix a time for the supply of the requisite stamp paper. But for this saving provision, a fresh plaint would have been indispensable, as it is, if the requisite stamp paper is not supplied within the time fixed. It appears to me that this provision of the law is in no manner inconsistent with the construction which I place upon the Court Fees Act. Because the law makes that provision in favour of the party whose plaint is defective in the matter of stamp, I cannot see why it should be said that the law empowers the Court to enlarge the period allowed by the Limitation Act, or gives retrospective validity to a document which, at the time when it was first presented, was invalid. Seeing that the Legislature had before them the proviso to the 28th Section of the Court Fees Act, which declares in favour of retrospective validity in the case therein provided for, it is not to be supposed that, in framing Section 54 of the Code, they intended that principle to be extended to cases not within the proviso. A still stronger argument of a similar character is furnished by Section 582 A of the Civil Procedure Code. That section which became law on the 29th July 1892 refers, like the second paragraph of Section 5 of the Limitation Act, to appeals and applications for review of judgment. The section provides for the case of an insufficiency of stamp "caused by "a mistake on the part of the appellant as to the amount of the requisite "stamp." It declares that, notwithstanding the insufficiency, the memorandum of appeal "shall have the same effect and be as valid as if it had been properly stamped." This section probably owes its origin to the decision of the Full Bench in *Bulkaran Rai* v. *Gobind Nath Tiwari*(1). It was there held that the practice of giving an appellant time to supply a deficiency of Court-fee stamp and treating the memorandum of appeal as validly presented on the day when it was presented with defective stamp, was [322] erroneous. This practice was one which generally prevailed in this and other Courts, and the effect of the new section was to legalize it, subject, however, to the condition that the deficiency of stamp was due to mistake on the appellant's part. In the absence of any such mistake it is clear now that in the case of appeals the decision of the Allahabad Court must prevail. The appeal must be rejected unless the memorandum adequately stamped is presented within due time. Since the Legislature has, by this new section, extended a limited indulgence to appellants, it cannot be supposed that it was intended to give plaintiffs, in respect of their plaints, the same indulgence in unqualified terms. To hold in favour of the plaintiff in the present case would mean that, whereas an appellant can take advantage of Section 582-A only on proving mistake, a plaintiff may deliberately and with his eyes open affix an inadequate Court-fee stamp and, on the balance being furnished within a time fixed, demand to have his plaint treated as if at institution it had been properly stamped. This cannot possibly have been the intention of the Legislature, for the section already mentioned and the latter part of Section 5 of the Limitation Act shows that appellants, not plaintiffs, are regarded as parties in whose favour the rigour of the law of limitation should be relaxed.

The case of *Skinner* v. *Orde* (2) is relied upon in this as in other cases as containing a dictum of the Judicial Committee in favour of the view advocated by the respondent's Vakil. *Skinner* v. *Orde* (2) is however easily distinguishable from the present case. There the petition as

(1) 12 A. 129. (2) 2 A. 241.

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originally presented by the plaintiff was complete and valid, and only required the order of the Court under Section 308 of the Code then in force to make it fully efficacious as a plaint. After the filing of the petition the plaintiff acquired the means requisite for paying the Court fee, and accordingly the proper stamp was affixed. The question was whether the plaintiff was, as regards the date of the presenting of his plaint, to be placed on the footing on which he could have been, had the order abovementioned been made, or whether the plaint should have been rejected altogether. There was no question, in that case, of validating a plaint which was, in its inception, invalid. In the present case, on the contrary that is precisely the [323] contention which must be raised, and it clearly is not admissible, because a transaction *ab initio* void cannot be validated.

I have already given reasons for holding that the plaint as presented was of no legal force or effect whatever. I agree with the decision in *Jainti Prasad* v. *Bachu Singh* (1). I reverse the decree of the District Judge and restore that of the District Munsif with costs.

DAVIES, J.—I entirely concur.

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**20 M. 323 = 6 M.L.J. 64.**

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

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RANGAMMAL (*Plaintiff*) *Appellant* v. VENKATACHARI (*Defendant*), *Respondent*.* [16th March, 1896.]

*Fraudulent conveyance—Collusive decree—Fraud on creditors—Fraudulent purpose carried out—Suit by legal representative of the fraudulent transferor and judgment debtor to set aside conveyance and restrain execution of decree—Widow of Hindu transferor.*

A with the intention of defeating and defrauding his creditors made and delivered a promissory note to B without consideration and collusively allowed a decree to be obtained aginst him on the promissory note and conveyed to B a house in part satisfaction of the decree: and it appeared that certain of A's creditors were consequently induced to remit parts of their claim. A having died, his widow and legal representative under Hindu Law, now sued B to have the promissory note and the conveyance set aside and to have the defendant restrained by injunction from executing the decree.

*Held*, (1) that the plaintiff was not entitled to relief, for A if now alive could not have claimed to have his own fraudulent act set aside and the plaintiff was in no better position than he would have been.

*Quare*: Whether a widow might successfully maintain a claim for maintenance out of property alienated by her husband without consideration and fraudulently if she herself was no party to the fraud.

[R., 33 C. 967 = 4 C.L.J. 22 = 10 C.W.N. 650 ; 4 N.L.R. 26 ; D., 3 P.R. 1906 = 109 P. L.R. 1906.]

THIS was an appeal from the decision of Subramania Ayyar, J., reported as *Rangammal* v. *Venkatachari* (2). The facts and pleadings are fully set out in the judgment of the Court below but for the purposes of this report may be here recapitulated.

[324] The plaintiff who was the widow and legal representative of one Virasami Ayyangar, deceased, sued to set aside (i) the mortgage of

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* Original Side Appeal No. 51 of 1895.

(1) 15 A. 65. (2) 18 M. 378.

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certain lands, dated the 3rd June 1891, executed by Virasami to the defendant, (ii) the decree in civil suit No. 319 of 1891, obtained by the defendant against Virasami in 1892 on a promissory note, also dated the 3rd June 1891, and (iii) the deed of sale of a house, dated 14th March 1893, executed by the latter to the former and for an injunction restraining him from enforcing the said mortgage and the sale, and from executing the decree.

The late Virasami Ayyangar was a trader, and at the time of the mortgage and of the promissory note mentioned above, was heavily indebted. The plaintiff alleged that Virasami in collusion with the defendant, for the purpose of defrauding his creditors executed the mortgage and the promissory note without receiving consideration for either of them and allowed the defendant to bring suit No. 319 of 1891, referred to above on the latter document and obtain a decree therein and executed the sale deed of the 14th March 1893 in part satisfaction of the amount alleged to be due under the said decree. The mortgage was found by the learned Judge in the Court below not to have been executed fraudulently without consideration. Upon this ground the plaintiff's suit with regard to the mortgage failed. The facts connected with the promissory note and the decree obtained thereon, as found by the learned Judge in the Court below were as follows: The promissory note was executed on the 3rd June, but no consideration for it passed then or at any other time. At about the time of the promissory note Virasami was indebted to one Virayya in the sum of Rs. 9,600, but, on the former representing his inability to pay a larger sum than Rs. 5,000, the latter accepted that sum in full discharge of his claim.

On the 18th November 1891, Messrs. King & Co., creditors of Virasami, filed a suit against him to recover the amount due to them. In the same month the defendant filed a suit to recover the amount alleged to be due on the promissory note of the 3rd June 1891. In February 1892 Messrs. King & Co., obtained a decree. On the 22nd February 1893, a notice was served on Virasami to show cause why the decree should not be executed. In the meantime the defendant had obtained a decree in the suit brought by him, and on the 14th March 1893, Virasami, in part satisfaction of the decree, executed in his favour the sale-deed which the plaintiff now sued to set aside. In August 1893, on Virasami **[325]** representing to Messrs. King & Co., that he was unable to pay their debt in full, they accepted part of the sum due under the decree in full satisfaction thereof. On these facts the learned Judge held that the promissory note of 3rd June 1891 was executed to defeat Virasami's creditors, that the decree in the suit on the promissory note was collusively obtained and that the sale-deed was fraudulent.

The learned Judge, following *Venkataramanna* v. *Viramma* (1) and *Chenvirappa* v. *Puttappa* (2), held that the decree having been collusively obtained, Virasami could not have set it aside and that therefore the plaintiff could not set it aside. With regard to the sale-deed, the learned Judge held that the sale could not be set aside inasmuch as Virasami had gained his fraudulent object in executing the promissory note of the 3rd June 1891 in suffering a decree to pass against him and in executing the sale deed in that he had induced Virayya and Messrs. King & Co., to accept less than the sums due to them.

The plaintiff appealed.

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(1) 10 M. 17. (2) 11 B. 708.

*Sundaram Sastri* and *Kumarasami Sastri*, for appellant.
The Advocate-General (Hon'ble Mr. *Spring Branson*), for respondent.

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**APPELLATE CIVIL.**

**20 M. 323= 6 M.L.J. 64.**

JUDGMENT.

We have no doubt but that the finding of the Court below on both the issues raised before it is correct, and that the legal inferences drawn therefrom are also correct. It is urged in appeal that the appellant was materially prejudiced by the absence of an issue as to whether or not the fraud of the appellant's late husband was accomplished in a substantial manner. We cannot admit this plea. It was the appellant's case that her late husband's acts were without consideration and were done with a view to defraud creditors. The evidence of the appellants' own first, third and fifth witnesses shows that he was successful, and induced his creditors thereby to give up their claims to large sums of money. It seems to us to be clear that the deceased could not, if now alive, come into Court and claim to have his own fraudulent acts set aside. But it is argued that the appellant, as his widow, is in a better position, and may claim relief against the consequences of her late husband's fraudulent transfers. We are unable to admit that, in the present case the widow is in a better position than her husband **[326]** would be, if alive. It is argued that the widow has a right to maintenance out of her husband's property, and has, therefore, an interest therein which *ipso facto* gives her a right to impeach its alienation, independently of the interest which she takes as widow and representative of the late owner. The case of *Ramanadan* v. *Rangammal* (1) is relied on in support of this contention. In regard to this plea, we think it enough to observe that there is no question of maintenance in the present case. We offer no opinion as to whether a widow might successfully maintain a claim for maintenance out of property alienated by her husband without consideration and fraudulently if she herself was no party to the fraud, but that is not the present case. Here she claims to set aside fraudulent transactions by which her husband profited and by which she, as his representative, has also presumably benefited. This the Courts will not assist her to accomplish. The learned Judge has gone fully into the authorities on this question and we entirely concur in the conclusions at which he has arrived. We confirm the decree of the Lower Court and dismiss this appeal with costs.

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**20 M. 326.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

YARAMATI KRISHNAYYA (*Defendant No. 1*), *Appellant v.* CHUNDRU PAPAYYA AND ANOTHER (*Plaintiff and Defendant No. 2*), *Respondents.**
[9th February and 7th April, 1897.]

*Fraud on creditors—Sham sale-deed to defeat creditors—Collusive decree—Suit to declare title of fraudulent transferor in possession.*

A executed a sale-deed of his land to B. An attachment placed on the land was raised at the instance of B as vendee. The attaching creditor sued impeaching the transfer as collusive; but finally consented to a decree upholding

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* Second Appeal No. 1455 of 1895.
(1) 12 M. 260.

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the title of B, who then applied to be registered as owner in the place of A. A, who remained in possession throughout, resisted the application, and now sued B for a declaration that he was entitled to remain on the register as owner. It was alleged and proved that the apparent sale-deed was a sham, and had been executed for no consideration with intent to defraud the plaintiff's creditors, and [327] that the plaintiff had paid the attaching creditor to consent to the above-mentioned decree to which both he and B were parties:

*Held*, that the suit should be dismissed.

[**Diss.**, 33 C. 967 (971) = 4 C.L.J. 22 = 10 C.W.N. 650; **N.F.**, 31 M. 97 (99) = 18 M.L.J. 151 = 3 M.L.T. 246; **F.**, 23 B. 406; 4 Ind. Cas. 233 (234) = 5 N.L.R. 146; 3 L. B.R. 245 (247); **R.**, 31 M. 485 (487) = 18 M.L.J. 576 = 4 M.L.T. 331; 32 M. 323 = 2 Ind. Cas 616 (617) = 5 M.L.T. 77; U.B.R. (1897—1901) 544; **D.**, 32 M. 325 (327) = 17 M.L.J. 386 (387) = 4 M.L.T. 279 = 5 M.L.T. 255.]

SECOND appeal against the decree of U. Atchutan Nayar, Additional Subordinate Judge of Rajahmundry, in appeal suit No. 48 of 1894, confirming the decree of T. Varadarajulu, District Munsif of Peddapur, in original suit No. 379 of 1892.

Suit to declare that the plaintiff was entitled to remain on the Revenue Register as owner of certain land. In 1884 the plaintiff, being heavily indebted, executed, without consideration, a sale-deed of the land in favour of the second defendant, the arrangement being, that the property should be reconveyed to him after his debts had been discharged; subsequently by arrangement between the plaintiff and the second defendant, the latter executed without consideration a sale-deed in favour of the first defendant. The plaintiff had throughout, up to the date of the suit, remained in possession of the lands. In 1887 one Manchina Ammanna, a creditor of the plaintiff, instituted a suit against plaintiff and obtained a decree, and in execution of the decree attached the lands in question. The attachment was resisted and raised. Manchina Ammanna, then, brought a suit—original suit No. 345 of 1887—making both plaintiff and first defendant parties to declare that the sale-deeds to the first and second defendants were nominal and were got up to secure the plaintiff's property from his creditors. The Munsif gave a decree in favour of Manchina Ammanna. When the case went up on appeal the parties to that suit entered into a compromise, in consequence of which the decree of the District Munsif was reversed, and the alienation now in question was upheld.

Both the Lower Courts gave plaintiff a decree. The first defendant appealed.

*Sivasami Ayyar*, for appellant.

*Sriramulu Sastri*, for respondents.

## JUDGMENT.

SUBRAMANIA AIYAR, J.—Both the Lower Courts found that the lands (to the registry whereof in the Government Revenue accounts the present litigation relates) belonged to the respondent (plaintiff), that they were in his possession before and at the time of the plaint and that the sale relied upon by the appellant (first defendant) as giving him a title to the property was a mere sham transaction under which no interest passed to him. Upon those findings it was held that the appellant had no right to claim that [328] the registry of the property be transferred to his own name, and a decree was given to the effect that the respondent was entitled to have his name retained in the register as it had stood hitherto.

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One of the contentions urged on behalf of the appellant was that the respondent was precluded from asserting his title to the land by the decision passed in appeal suit No. 105 of 1889 on the file of the Cocanada Subordinate Court. This contention, though advanced for the first time in this Court, must prevail, inasmuch as the facts required to support it are either set out in the plaint itself or are otherwise admitted.

They are as follows: One of the respondent's creditors instituted original suit No. 345 of 1887 for the purpose of establishing that the transaction purporting to be the sale in favour of the present appellant was but a device intended to defraud the creditors, and therefore the lands in question were really the property of the respondent. Both the parties to the present appeal were made defendants to the suit, and a decree was therein given in favour of the creditor. The respondent however caused the present appellant to prefer an appeal against the said decree No. 105 of 1889 already mentioned. The creditor and the present respondent were made respondents to such appeal. The Appellate Court, with the consent of the parties, including the present respondent himself, reversed the decree and upheld the alienation to the present appellant. The collusive decree thus passed cannot be impeached by the respondent (*Venkatramanna* v. *Viramma* (1)). On this ground alone and without going into the other points argued I would reverse the decrees of the lower Courts and dismiss the suit, but without costs.

BENSON, J.—The main question in this second appeal is whether the plaintiff can maintain the suit, based as it is on the allegation that certain sale-deeds executed by the plaintiff were collusive and sham documents, executed for the purpose of protecting his property against creditors.

The facts of the case are briefly as follows: The plaintiff, being heavily involved in debts, executed, without consideration, a sham sale-deed of certain lands in favour of the second defendant, and afterwards caused the latter to execute another sham sale-deed in favour of the first defendant.

Plaintiff, however, remained in possession of the land.

**[329]** In original suit No. 345 of 1887, a creditor of the plaintiff attached the lands in execution of a decree against the plaintiff. The sham sale-deeds were used as a cloak, and the attachment was successfully resisted. The creditor then sued for a declaration that the sale-deeds were collusive, and got a decree in the first Court. In appeal, however, the plaintiff paid him a certain sum and induced him to consent to a decree admitting the title of the first defendant, and a decree was passed accordingly. In 1892 the first defendant applied to the Collector for transfer of revenue registry of the lands to his (first defendant's) name, and the Collector issued a notice that he would alter the register unless plaintiff established his right by a civil suit. Plaintiff, therefore, brought the present suit for a declaration that the registry of the lands was not to be altered. Both the lower Courts decreed in his favour, and first defendant now appeals against these decrees.

I do not think that the plaintiff's suit is maintainable.

The law on the subject is very fully discussed in the case of *Chenvirappa* v. *Puttappa* (2) in *Rangammal* v. *Venkatachari* (3) in *Sham Lall Mitra* v. *Amarendro Nath Bose* (4), and in the recent English case of *Kearley* v *Thomson* (5). The general rule is that a man cannot set up an

(1) 10 M 17. (2) 11 B. 708. (3) 18 M. 378.
(4) 23 C. 460. (5) L. R. 24 Q. B. D. 742.

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illegal or fraudulent act of his own in order to avoid his own deed (May on Fraudulent Conveyances, 432). But some exceptions or *quasi* exceptions to this rule have been admitted by the Courts. In *Symes* v. *Hughes* (1) a fraudulent transfer was set aside in order that effect might be given to a compromise arranged between the transferor and his creditors. Here it will be observed that the Court acted in the interest, and for the protection, of innocent third parties. It may well be doubted whether a decree would have been given in that suit for the benefit of the transferor alone. So if a voluntary deed has been kept in the hands of the grantor, and has never been acted upon, nor the grantee informed of its existence, a Court of Equity will treat it as an imperfect instrument, and, if the grantee surreptitiously gets possession of it, a Court of Equity will relieve against it (*Cecil* v. *Butcher* (2)).

A third exception was noticed by Parker, J., in *Venkataramanna* v. *Viramma* (3), *viz.*, where a defendant is allowed to show **[330]** the turpitude of both himself and the plaintiff in order to protect himself against an action by the plaintiff to give effect to a contract or deed entered into for an illegal or immoral purpose. Here an exception is allowed not for the sake of the wrong doer, but on grounds of public policy, since the Court ought not to assist a plaintiff to recover property or enforce a contract in respect of which he has no true title or right. The rule of public policy cannot be applied without allowing the defendant to benefit by it. But the benefit is allowed him by accident as it were and not in order to secure him any right to which he is entitled (*Holman* v. *Johnson* (4), per Lord Mansfield, and *Luckmidas Khimji* v. *Mulji Canji* (5). Even this exception is not allowed, if a decree has been obtained by the fraud and collusion of both the parties. In such a case it is binding on both, *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy* (6), *Prudham* v. *Phillips* (7), *Venkatramanna* v. *Viramma* (3), and *Chenvirappa* v. *Puttappa* (8).

I think that, broadly speaking, these are the only exceptions which are to be gathered from the English cases, and from the reported cases in this Court and in the Bombay High Court. The Calcutta High Court has gone further *Debia Chowdrain* v. *Bimola Soonduree Debia*(9), *Bykunt Nath Sen* v. *Goboollah Sikdar*(10), but the rule there laid down has been expressly dissented from by the Bombay High Court *Chenvirappa* v. *Puttappa* (8), which, as I think, justly remarks: "These decisions go a "long way towards enabling a party to a dishonest trick, by which his cre-"ditors may have been defrauded, to get himself reinstated when his purpose "has been served."They have been dissented from also by this Court (*Rangammal* v. *Venkatachari* (11), confirmed in *Rangammal* v. *Venkatachari* (12). The Calcutta rule has, indeed, notwithstanding these dissents, been affirmed in *Sham Lall Mitra* v. *Amarendro Nath Bose* (13). In doing so the Court relied on the case of *Symes* v. *Hughes*(1) already cited by me and on the case of *Taylor* v. *Bowers*(14) : In the former case, however, the interests of third parties were involved, and the latter case has been dissented from in *Kearley* v. *Thomson*(15). Fry, L. J., in delivering judgment, stated " In that case (*Taylor* v. *Bowers* (14)) Mellish, L. J., in **[331]** delivering " judgment, says at page 300' if money is paid, or goods delivered for an

(1) L.R. 9 Eq. 475. (2) 2 Jac. and W. 565. (3) 10 M. 17.
(4) Cowper, 343. (5) 5 B. 295. (6) 6 B. 703.
(7) 2 Amb. Rep. 763. (8) 11 B. 708. (9) 21 W.R., 422.
(10) 24 W.R. 391. (11) 18 M. 378. (12) 20 M. 323.
(13) 23 C. 460. (14) L.R. 1 Q.B.D. 291. (15) L.R. 24 Q.B.D. 742.

"'illegal purpose, the person who has so paid the money or delivered the "'goods may recover them back before the illegal purpose is carried out.' "It is remarkable that this proposition is, as I believe, to be found in no "earlier case than *Taylor* v. *Bowers*(1) which occurred in 1867, and not- "withstanding the very high authority of the learned Judge who ex- "pressed the law in the terms which I have read, I cannot help say- "ing for myself that I think the extent of the application of that principle, "and even the principle itself, may, at some time hereafter, require con- "sideration, if not in this Court, yet in a higher tribunal; and I am glad to "find that in expressing that view I have the entire concurrence of the "Lord Chief Justice." This passage was quoted with approval by this Court in *Rangammal* v. *Venkatachari*(2). With the exception, then, of the cases to which I have referred, and which have been dissented from, I do not think that any authority will be found for holding that a plaintiff can come into Court alleging his own fraud and ask the Court simply and solely for his own benefit to set aside the fraudulent deed or make a declaration to protect him from the threatened consequences of his own act. In such a case the Court may well decline to move and may answer the plaintiff in the words which are often quoted from Story's "Equity Jurisprudence' "where the party seeking relief is the sole guilty "party, or where he has participated equally and deliberately in the "fraud, or where the agreement which he seeks to set aside is founded "in illegality, immorality or base and unconscionable conduct on his "own part; in such cases Courts of Equity will leave him to the conse- "quences of his own iniquity and will decline to assist him to escape "from the toils which he has studiously prepared to entangle others" (Section 268). Especially will this be the case if the purpose of the fraud has been effected by defeat of a third person's rights asserted in Court or effected in any other material way *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy* (3) *Venkatramanna* v. *Viramma* (4) *Chenvirappa* v. *Puttappa* (5) *Rangammal* v. *Venkatachari*(2). I think, then, that the plaintiff, apart from his conduct in original suit No. 345 of 1887, has no title to come to a Court of Equity and ask for such a declaration as he now seeks. **[332]** If the defendant were now seeking the assistance of the Court to obtain possession of the land from the plaintiff, it may well be that the Court would allow the plaintiff to plead the true rights of the parties, even though the plea involved a declaration by the plaintiff of his own turpitude. The Court would then allow the plea on grounds of public policy, and in order that it might not itself be made an instrument to aid the defendant in his fraudulent claim to possession contrary to the real agreement with the plaintiff. That, however, is not the case before us. The plaintiff is in possession, and he may be left to rely on it if the defendant seeks to disturb him.

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The impropriety of assisting the plaintiff becomes, I think, even more clear, if his conduct in original suit No. 345 of 1887 be considered. In that suit the sham sale-deed was successfully used as a cloak to defeat an attaching creditor, and the latter was thus driven to a regular suit. He then succeeded in showing in the Court of First Instance that the sale-deed was a sham, but the present first defendant (then third defendant) in collusion with the plaintiff (then first defendant) appealed against the decree. The appeal was compromised by the present plaintiff paying

(1) L. R. 1 Q. B. D. 291. (2) 18 M. 378. (3) 6 B. 703.
(4) 10 M. 17. (5) 11 B. 708.

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Rs. 150 to the attaching creditor, and a decree was passed affirming the title of the present first defendant.

Thus the sham sale-deed was successfully used in a Court of Justice for the purpose for which it was concocted, *viz.*, to defeat and delay a creditor, and the plaintiff afterwards acknowledged its validity in a Court of Justice and caused a decree to be passed affirming the same (see present plaint), a decree to which both he and the present defendants were parties (Exhibit L).

I think that, in these circumstances, it would be contrary to public policy, and disastrous to public morality, that the Courts should now allow him to plead his own baseness and should actively assist him to undo his own solemn acts, and this even before his possession of the property is actually attacked by the partner of his crime. I would, therefore, set aside the decrees of the Courts below and dismiss the plaintiff's suit, but without costs, in consideration of the defendant's fraudulent conduct.

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**20 M. 333.**

## [333] APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.*

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VARADARAJULU NAIDU (*Plaintiff*), *Appellant v.* SRINIVASULU NAIDU (*Defendant*), *Respondent.**
[2nd and 25th February, 1897.]

*Collusive decree to defeat rights of a third party—Suit to set aside decree.*

The plaintiff was a Hindu, who, in order to prevent his undivided son from obtaining his share of the family property, made and delivered to the defendant certain promissory notes unsupported by consideration, the agreement between them being that the defendant should obtain a decree on the notes and in execution attach and bring to sale and himself purchase the lands of the family and should hold them at the disposal of the present plaintiff. The suit and the subsequent proceedings in Court were carried on by them collusively, the present plaintiff supplying the necessary funds. The son then sued for his share of the property, and having, with the aid of his father (who had meanwhile lost his confidence in the defendant) successfully impeached the sale as collusive, obtained a decree which was executed. It had been agreed that the defendant should hold the land at the disposal of the plaintiff, but he now refused to surrender to him his share. The plaintiff accordingly sued to recover his share of the property and for a declaration that the collusive decree against him and the subsequent proceedings in execution thereof were not binding on him;

*Held*, that it is not competent to a party to a collusive decree to seek to have it set aside, and that the plaintiff accordingly was not entitled to relief.

[F., 8 Ind. Cas. 1179 (1180) = 6 N.L.R. 177; R., 23 B. 406; 24 M.L.J. 49 (50); 8 O. C. 278 (281); 3 P.R. 1906 = 109 P.L.R. 1906.]

APPEAL against the decree of Davies, J., on the original side of the High Court in civil suit No. 90 of 1895.

This was a suit to declare that a promissory note for Rs. 6,050, executed by the plaintiff in favour of the defendant, was collusive, and not supported by consideration, and that a decree obtained by defendant thereon and execution proceedings taken under that decree were collusive, and that the defendant acquired no right in the properties, belonging to the plaintiff, which were sold in execution of the decree and purchased by

* Original Side Appeal, No. 32 of 1896.

the defendant. The facts on which the plaintiff relied were set forth in paragraphs 1—9 of his plaint, which were as follows :—

"That the plaintiff's son, N. Vencatasami Nayudu, a young man, "was unruly and disobedient to the plaintiff and became impertinent "owing to the chance of his being able, as plaintiff's only son, to acquire "the family properties.

**[334]** "That for the purpose of his (plaintiff's son) being brought to "submission to the plaintiff and to be dutiful to him, it was thought "necessary to devise some means or contrivance.

"That the defendant was in 1891 living with the plaintiff and in his "house and the plaintiff had confidence in him. It was agreed between "the plaintiff and the defendant in Madras in 1891 that the plaintiff "should execute a promissory note in defendant's favour for a large sum "of money, that the defendant was to file a suit against plaintiff thereon "and obtain a decree and execute same by attachment and sale of "plaintiff's properties, unless in the meanwhile the plaintiff's said son "was reclaimed and became submissive, or plaintiff thought fit to stop "same or at any time to deal with the properties, that the plaintiff was "to supply funds for litigation, that the defendant was not to benefit at "all by these various transactions and that the properties or their sale "proceeds were always to be the plaintiff's, and that the defendant, at "plaintiff's request, was to do everything that the plaintiff might at any "time require to deal with the properties as his own, that the defendant "was not to do anything prejudicially to the plaintiff or to his interest, "the sole object of those transactions being to reduce the plaintiff's son "to submission to plaintiff.

"That in pursuance of the said arrangement and for no considera-"tion whatever, five promissory notes were executed on the same date "for Rs. 1,500, Rs. 1,200, Rs. 1,600 and Rs. 875, and Rs. 6,050, respecti-"vely, but the first four were made respectively to bear different dates, "*viz.*, 10th February 1890, 18th October 1890, 2nd January 1891, and "6th March 1891 to give a colour of truth to the transactions and to make "it appear that the last was executed in renewal of the earlier ones.

"That, upon the promissory note of Rs. 6,050 bearing date the 1st "of August 1891, a suit was filed with funds supplied by plaintiff in this "Honorable Court, being civil suit No. 241 of 1891, by defendant "against plaintiff on or about 5th September 1891, and the defendant "admitted execution and claim, and the decree was passed in or about "27th October 1891 for Rs. 6,683-8-7 inclusive of costs or thereabouts.

"That the decree was not executed for some time thereafter to see "whether the plaintiff's son would become obedient; that there "being no hope of same, the defendant executed the decree with "funds supplied by plaintiff against properties more particularly "**[335]** described in the schedule hereto and the same were sold in exe-"cution and purchased by defendant.

"That the said promissory note and the decree and the execution "proceedings were all show transactions not supported by consideration "and brought about for the purposes above mentioned, and defendant ac-"quired no rights thereunder for himself or his benefit, but that he is a "trustee for the plaintiff in respect of any property or rights he may have "acquired.

"That the plaintiff attempted in or about August 1893 to sell the "said properties and asked the defendant to join him and enable him so "to do, but he evaded to comply with plaintiff's request and illegally

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"refused to do so, unless the plaintiff paid him some money and thus "broke the agreements with the plaintiff and acted fraudulently and "dishonestly.

"That the plaintiff's said son filed a suit against the defendant, being "civil suit No: 174 of 1893, in this Honorable Court, setting out these "facts and claiming the properties, and obtained a decree against the "defendant to the extent of his interest therein, and the plaintiff supported "his son in making out the true state of things as the defendant became "fraudulent and deceitful.

"The defendant asserted that the promissory note for Rs. 6,050 was "executed for consideration and denied that the decree and execution "proceedings were collusive.

"In the suit brought by plaintiff's son, civil suit No. 174 of 1893, "both the plaintiff and the defendant were made parties, and a decree was "passed declaring that the proceedings in execution and the sale were "void and had no effect whatever against the interest of the plaintiff's "son in the property."

The suit was tried by Davies, J., who delivered the following judgment:—

DAVIES, J.—The plaintiff entered into an agreement with the defendant by which the defendant first sued the plaintiff on a promissory note for Rs. 6,050 executed by plaintiff and having got a decree (Exhibit B) by consent thereon (Exhibit III), then executed it against plaintiff's property selling up and buying his lands in discharge thereof. The plaintiff now alleges that these were all sham transactions gone through for the purpose of reducing his son to obedience, and he prays for a decree setting aside the decree B passed on the promissory note, and the execution proceedings taken thereupon as null and void, and for a declaration that the defendant has acquired no right or interest in the plaint properties, or in lieu of these reliefs a decree, for Rs. 6,689 odd, as damages **[336]** for defendant's breach of contract in not re-conveying to him the plaint lands as was originally agreed to between the parties, after the object of the transactions had been served.

Now the plaintiff's son has had his right declared to half the plaint properties in original suit No. 174 of 1893 on the file of this Court in which he sued his father, the present plaintiff, and the present defendant as first and second defendants for the fraud that had been practised on him and the findings in that suit are admittedly binding on the parties to this suit. It was then found that the transactions, the subject of the present suit, were merely colourable, and there was no consideration for the promissory note and also that the properties in question were not the self-acquired property of the present plaintiff as was alleged, but family property in which the plaintiff's son, had a half share (*vide* issues and judgment in that suit marked C and D). The real question I have to determine in this suit is whether the plaintiff acted as he did with a fraudulent intent upon his son's rights, and I think there can be no doubt about it on the facts shown. Not only did the plaintiff claim the plaint properties or at least some of them as his self-acquisition (see his affidavit, Exhibit I), but he placed those properties by the action he took beyond the reach of his son, who was compelled to bring a suit to recover his rights thereon. It is all very well for the plaintiff to say it was done with the object of bringing his son to submission, but as it appears that the son was claiming his rights against his father at the time, the father's intention clearly was to defraud his son of his rights by divesting himself

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of the whole of the family property. The steps taken by the plaintiff went far beyond the necessities of the case, if it was only to bring a recalcitrant son to order. The fact was there was a dispute between father and son as to the family property, and the father thought to settle the matter by depriving the son entirely of his half share, by disposing of the whole property as if it was his self-acquisition with the power to get it back for himself when it suited his convenience. This was clearly a fraud upon the son, and it has been so found in the suit brought by the son (Exhibit D). Finding, then, that there was not only a fraudulent intent on the part of the plaintiff against his son, but that the fraud was actually effected in so much as it necessitated the bringing of a suit by the son to get the fraud done away with, the question remains whether the plaintiff is now entitled to relief against the other conspirator in the fraud. Considering that the arrangement between them culminated in a decree of Court and execution proceedings solemnly **[337]** conducted thereafter, the law is clear that the plaintiff is entitled to no relief—*vide* *Venkatramanna* v. *Viramma* (1), *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy* (2), *Chenvirappa* v. *Puttappa* (3), and *Rangammal* v. *Venkatachari* (4), the case of *Param Singh* v. *Lalji Mal* (5) on which plaintiff relies—notwithstanding. This latter case was relied on by plaintiff, perhaps, more to support his claim for damages under the agreement of defendant marked A to recover the property, but that letter does not contain any fresh agreement made by defendant after the fraud was completed. It is only an acknowledgment of the original and collateral agreement made when the fraud was contemplated. Having its inception in fraud it is not valid, but even treating it as a new agreement it would be void under Section 23 of the Contract Act as its object would be to defeat a provision of law, namely, the incapacity of the plaintiff to obtaining any relief by giving him indirectly the relief that he cannot obtain directly. The plaintiff's prayer for setting aside the decree on his promissory note and for a declaration against defendant's interest in the property, cannot be granted on the ground that he was a party to the fraud by which those things were brought about and his prayer for damages in lieu of those reliefs, must also be refused on the ground that it is based on the breach of an agreement which is invalid, as being part and parcel of the fraudulent scheme. The plaintiff has joined another cause of action in this case, namely, a claim for damages for his being arrested and imprisoned by the defendant under warrant—(Exhibit II) for a balance due under the fraudulent decree. That cause of action arises clearly in tort and not in breach of contract, and must be rejected as a misjoinder, as it was not permissible to combine it in a suit to obtain a declaration of title to immoveable property (Section 44, Code of Civil Procedure).

The result is that the plaintiff's suit is dismissed with costs.

Plaintiff appealed.

Mr. *K. Brown*, for appellant.

*Srinivasulu Naidu*, for respondent.

## JUDGMENT.

We agree with the learned Judge in holding that the plaintiff must have intended to defeat his son's claim to the property and that, therefore, the arrangement made between him and the defendant was contrived in fraud of his son. But it was **[338]** argued that since the plaintiff had

(1) 10 M. 17. (2) 6 B. 703. (3) 11 B. 708. (4) 18 M. 378. (5) 1 A. 403.

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repented of his conduct before any harm was done to his son or any effect given to the transaction, it was competent to him to repudiate it and have the property restored to him.

The case of *Symes* v. *Hughes* (1) cited by the appellant's counsel does not really support the proposition for which it was cited, for there, as the Master of the Rolls observes, the suit was prosecuted for the purpose of enabling the creditors to recover something. Here it is the party himself who, in his own interest, seeks to have the transaction annulled. It is very doubtful whether, in a case in which the maxim *in pari delicto* would otherwise apply, any exception arises by reason that the illegal purpose has not been carried out (*Kearley* v. *Thomson* (2) and *Sham Lall Mitra* v. *Amarendro Nath Bose* (3)). In the present case the transfer of the property to the defendant had been completed, nothing remained to be done by the plaintiff, and it was only by means of a suit that his son vindicated his rights. Under these circumstances, we do not think it is possible to say that the plaintiff's fraudulent purpose had not been carried into effect.

There is, however another ground on which we may base our judgment and that is that it is not competent to a party to a collusive decree to seek to have it set aside. Strangers, no doubt, may falsify a decree by charging collusion, but a party to a decree not complaining of any fraud practised upon himself cannot be allowed to question it.

There is ample authority for his proposition beginning with the *dictum* in *Prudham* v. *Phillips* (4) (cited in argument in the Duchess of Kingston Case (5)).

The distinction between fraud and collusion lies in this that a party alleging fraud in the obtaining of a decree against him is alleging matter which he could not have alleged in answer to the suit, whereas a party charging collusion is not alleging new matter. He is endeavouring to set up a defence which might have been used in answer to the suit, and that he cannot be allowed to do consistently with the principle of *res judicata*.

The appeal is dismissed.

*Rencontre*, attorney for appellant.

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**20 M. 339 = 7 M.L.J. 311 = 2 Weir 175.**

## [339] APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

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QUEEN-EMPRESS *v.* MOTHA.* [8th and 16th September, 1897.]

*Criminal Procedure Code—Act X of* 1882, *Section* 195—*Sanction to prosecute—Power of Court to go outside record.*

A Magistrate in deciding whether to sanction under Criminal Procedure Code, Section 195, a prosecution for giving false evidence has power to hold an enquiry and record other evidence besides that in the case before him, in the course of which the offence is supposed to have been committed.

[F., 4 L.B.R. 234 (236); 2 Weir 177; R., 10 Cr.L.J. 225 = 2 S.L.R. 11 Cr.; 13 Cr. L.J. 209 (214) = 14 Ind. Cas. 305 = 22 M.L.J. 419 = 11 M.L.T. 367 = (1912) M.W.N. 499.]

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* Criminal Revision Case No. 169 of 1897.

(1) L.R. 9 Eq. 475. (2) 24 Q. B. D. 742. (3) 23 C. 460.
(4) 2 Ambler, 763. (5) 20 State Trials, 479.

1897 SEP. 16. — APPELLATE CRIMINAL. — 20 M. 339 = 7 M.L.J. 311 = 2 Weir 175.

PETITION under Sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the judgment of the Joint magistrate of Tinnevelly in criminal appeal No. 45 of 1897, confirming the order of the Sub-Magistrate of Tuticorin in criminal petition No. 230 of 1896, sanctioning the prosecution of the petitioner for making false statements in criminal case No. 399 of 1896 on his file.

The facts appear sufficiently from the judgment of the High Court.

*Rangachariar*, for petitioner.

The Public Prosecutor (Mr. *Powell*), for the Crown.

Mr. *Adam*, for complainant.

## JUDGMENT.

In this case one Motha was said to have committed an offence punishable under Section 193, Indian Penal Code, in a case before a Magistrate, and the Magistrate, in giving sanction under Section 195, Criminal Procedure Code, for his prosecution, held an enquiry and recorded other evidence besides that in the case before him to show that there was *prima facie* ground for the prosecution. It is contended for the petitioner before us that the original case before the Magistrate disclosed no foundation for the charge under Section 193, Indian Penal Code, and that, therefore, the Magistrate had no power to make any enquiry or grant the sanction. In support of this argument reliance is placed on the decisions in *Zemindar of Sivagiri* v. *The Queen* (1) and *Abdul Khadar* [340] v. *Meera Saheb* (2). We are unable to accede to the petitioner's contention. The decision in *Zemindar of Sivagiri* v. *The Queen* (1) was based on the language of Section 468 of the Criminal Procedure Code then in force (Act X of 1872), and on certain remarks of Garth, C.J., in *Kasi Chunder Mozumdar, in re* (3) under the same Code. In neither of these cases did the learned Judges refer to the effect of Section 471 of the then Criminal Procedure Code though the section appears to have been mentioned in the course of the argument in the Madras case. We find it difficult to reconcile the decisions with the provisions of that section; but since those cases were decided, the provisions of the Code of Criminal Procedure upon the point under consideration have been altered and enlarged. Section 468 of Act X of 1872 provided that "a complaint of an offence against public "justice" described in certain sections of the Indian Penal Code, "*when* "*such offence is committed before or against* a Civil or Criminal Court shall "not be entertained in the Criminal Courts except with the sanction of "the Court before or against which the offence was committed, or of "some other Court to which such Court is subordinate." Section 195 of Act X of 1882 provides that "no Court shall take cognizance of any offence "punishable under" the same sections "*when such offence is committed in,* "*or in relation to, any proceeding in any Court* except with the previous "sanction or on the complaint of such Court or of some other Court to "which such Court is subordinate." Then Section 476 of Act X of 1882 provides that "when any Civil, Criminal or Revenue Court, is of opinion that "there is ground for inquiring into any offence referred to in Section 195 "and committed before it, or brought under its notice in the course of a "Judicial proceeding, such Court, after making any preliminary inquiry "that may be necessary, may send the case for inquiry or trial to the "nearest Magistrate of the first-class and may send the accused in custody, "or take sufficient security for his appearance, before such Magistrate,

(1) 6 M. 29. (2) 15 M. 224. (3) 6 C. 440.

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"and may bind over any person to appear and give evidence on such "inquiry or trial." The powers conferred by this section are much more extensive than those conferred by Section 471 of Act X of 1872, and we have no doubt but that it is now open to a Magistrate when a person is accused of having committed before him an offence punishable [341] under Section 193 of the Indian Penal Code to inquire into the truth of the accusation, and then, if it seems proper in the interests of public justice, to give sanction for the prosecution, even though the original record did not, on its face, disclose that the offence had been committed.

The words of the sections contain no limitation to an offence appearing on the face of the record though nothing would have been easier than to have expressed such limitation if it was intended to have effect. To admit the petitioner's contention would be by an artificial rule to screen from prosecution men who might have committed the grossest offences against public justice and offences perfectly capable of being proved, merely because owing to surprise, accident, oversight, or unavoidable circumstances, evidence of the offence was not, or could not be, produced before the Court at the same time that the offence was committed.

It is, however, argued for the petitioner that the decision in *Zemindar of Sivagiri* v. *The Queen* (1) was followed in *Abdul Khadar* v. *Meera Saheb* (2). The former case is no doubt referred to in the latter, but without any reference to the fact that in the interval the law had been materially altered, nor was it necessary for the decision in *Abdul Khadar* v. *Meera Saheb* (2) to follow the decision in *Zemindar of Sivagiri* v. *The Queen* (1).

The report in *Abdul Khadar* v. *Meera Saheb* (2) is very brief and imperfect, but there the sanction was revoked, because the document "had not been given in evidence in the case," and, therefore, no offence under Sections 403 and 471, Indian Penal Code, had been committed. The approval of the decision in *Sivagiri Zamindar* v. *The Queen* (1) (if it was approved) was a mere *obiter dictum.* It was not necessary for the decision of the case then before the Court, nor was it, in fact, the ground of that decision and no reference was made to the change in the law made by Act X of 1882.

We must, therefore, hold that that decision does not support the petitioner's contention.

In the recent case of *Shashi Kumar Dey* v. *Shashi Kumar Dey* (3) the view we have taken was expressly maintained with reference to the language of the present Criminal Procedure Code.

We dismiss the petition.

Ordered accordingly.

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(1) 6 M. 29. (2) 15 M. 224. (3) 19 C. 345.

20 M. 342=7 M.L.J. 207.

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## [342] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

BALUSAMI PANDITHAR (*Defendant No.* 3), *Appellant v.*
NARAYANA RAU (*Plaintiff*), *Respondent.**
[5th and 8th February and 20th July, 1897.]

*Hindu Law—Succession—Reversionary rights—Sister's grandson—Maternal uncle's son.*

The plaintiff sued as the nearest reversionary heir of one Vasudeva deceased to obtain a declaration that certain alienations made by the widow (who was defendant No. 1) in favour of defendant No. 2 was not binding on the reversion. Defendant No. 3 was the son of Vasudeva's sister's son, and was joined in the suit, because he claimed to be a nearer heir than the plaintiff who was the son of Vasudeva's maternal uncle.

*Held*, that both the plaintiff and defendant No. 3 were athma bandhus of the deceased, but defendant No. 3 was the nearer reversionary heir.

[R., 29 M. 115 (116); 33 M. 439 (445)=5 Ind. Cas. 280=20 M.L.J. 275=7 M.L.T. 203; 35 M. 152 (160)=11 Ind. Cas. 885=21 M.L.J. 856 (868)=10 M.L.T. 226; 24 M.L.J. 301=13 M.L.T. 213=(1913) M.W.N. 202 (203).]

APPEAL against the decree of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, in original suit No. 56 of 1894.

This was a suit brought for declarations that the plaintiff was the nearest reversionary heir to the properties of Vasudeva Pandithar, late husband of the first defendant; and that the alienation of certain properties by the first to the second defendant, under a document, dated the 18th February 1893, was invalid as against the plaintiff.

The third defendant was added as a defendant, because he had asserted an interest in the properties of Vasudeva in original suit No. 47 of 1893 claiming to be Vasudeva's sister's son's son. The plaintiff denied that the third defendant was so related to Vasudeva, and contended that, even if this relationship be true, his right was superior to that of the third defendant.

The relationship of defendant No. 3 to the deceased Vasudeva was found to be as stated above and the plaintiff was found to be the son of Vasudeva's maternal uncle. The main question therefore in the suit was which of them was the nearer heir. As to this the Subordinate Judge said:—"They both fall under the class of bandhus and are also the athma "bandhus of Vasudeva Pandithar. Plaintiff being also expressly named as "one's own bandhu [343] in the text of 'Vijnaneswara' quoted in Chapter "II, Section 6, verse 1 of the Mitakshara. The contention of the plaintiff is "that, though the third defendant is a bandhu of his grandmother's brother, "the latter was not the third defendant's bandhu; and that, as they are thus "not, related as bandhus to each other and that as he and Vasudeva "Pandithar were related as such, he is the superior heir. That such a "condition should exist, admits of no doubt (*Babu Lal* v. *Nanku Ram* (1)) "and I find that the third defendant also fulfils it, Vasudeva being the "pitru bandhu of the third defendant, he was a cognate of the third de-"fendant's father. The son of a daughter of a sister was held in *Umaid* "*Bahadur* v. *Udai Chand* (2) to be a bandhu of his grandmother's brother;

* Appeal No. 44 of 1896.

(1) 22 C. 339.

(2) 6 C. 119.

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"and there can, therefore, be no doubt regarding the position of a sister's "son's son.

"Both plaintiff and the third defendant are, therefore, the bandhus "of late Vasudeva as the latter was of them, and they are therefore pro-"perly qualified to inherit. But the difficulty is, which of them should be "preferred. The Vakil for the third defendant relied on the order of "succession among cognates according to the Mitakshara published in a "recent work on the Hindu Law by J. U. Battacharya, a native Hindu "Lawyer of Bengal, in which a grandson of a sister is ranked No. 7 as an "athma bandhu *ex parte maternal* to whom the *propositus* is pitru bandhu, "while the son of a maternal uncle comes under No. 16. But if the test "of the last rule propounded in *Muttusami* v. *Muttukumarasami* (1), *viz.*, "'that, as between bandhus of the same class, the spiritual benefits they "'confer upon the *propositus* is, as stated in 'Viramitrodaya,' a ground of "'preference :' if this test be applied to the present case, the plaintiff ap-"pears to me to be the preferable heir. According to the evidence of two "priest Brahmans of the class to which these parties belong, who have been "examined as the plaintiff's fourth witness and third defendant's second "witness, it is found that the plaintiff offers tarpanams to his paternal "aunt and her son when he makes his daily Brahma Yeggiams and also "on Mahaliam tarpanam occasions, while a sister's grandson offers none "to his father's or mother's maternal uncle on those or any other occa-"sions. Again, the son of a maternal uncle offers funeral oblations to the "maternal grandfather and great-grandfather [344] of the *propositus*, to "whom the *propositus* himself offers similar oblations; and the sister's "grandson offers nothing to any common ancestors of himself and the "*propositus*.

"It was said that, according to a text of the 'Nirnaya Sindhu,' a "work on the Hindu Law of rituals, which admittedly governs the class "of Brahmans to which these parties belong, a sister's son's son is entitled "to perform the funeral ceremonies of his grandmother's brother, while "the son of a maternal uncle had no place given him for such perform-"ance in any text quoted in that work.

"Examining this work, which had not been translated, with the aid "of a Sanskrit pundit, I find that neither the son of a maternal uncle nor "the grandson of a sister have been named as persons entitled to perform "such funeral obsequies. In the chapter relating to Srardah Prakaranam, "15 persons have been named as persons entitled to perform the cere-"monies; and of them, the sister's son is the last: a grandson of a sister "is not named in it. In page 309 of this work (I refer to the one pub-"lished in Devanagiri character in 1892 by Sridhara Sivalala) a text of "'Katyayana' in Madana Ratnam is quoted, which is as follows :—A "sister should be preferred to her sons. One who may be senior or junior "should perform samascaram to her brother. In their absence, a step-"sister should do it. In the same way their sons should do.

"In page 305 of the same work, this rule is further emphasized in "a text of 'Yajanavalkya' therein quoted, which runs thus: son, son's "son, son's grandson putrikaputran, wife, brother, his son, father, mother, "daughter-in-law, sister, her son, sapindas, samanodakan,—these in their "order, in the absence of those who are named above them, are qualified "to offer pindam.

(1) 16 M. 23.

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"A quotation from 'Kala Dharisam' is made in page 310 of the "same work which substantially adopts the aforesaid rule with the "addition that it introduces a daughter's son after the putrikaputran and "one who takes the heritage. But a little above in the page is given a text "as follows: a daughter-in-law, son of a sister, his son, gnathi, sammandhis "and bandhus should perform ceremonies to one dying sonless.

"It is this passage and this alone introduced the name of a sister's "son's son and omitted that of the sister after the daughter's son. It "also adds after samanodakan, matha sapindan, matha samanodakan, "sishia, ruthwick, acharian, son-in-law and a fellow [345] student. It "also puts the wife after matha samanodakan instead of before the "brother. If this passage be correct and it is on this that the third "defendant relies, it is some authority for the third defendant. But, "having regard to the other texts quoted already, it rather appears that "there is some mistake in the reading of this passage. How the sister's "descendants come in even without their mother is not clear. Her name "was expressly mentioned in all the slokas quoted above, and even a step-"sister is given her place after the uterine sister.

"If the term tat-putra should follow 'swasa' with a 'cha' also "following it (*i.e.*, swasacha tat-putra) the whole sloka becomes then "consistent with the other passages already quoted, and it will then give "the sister and her son alone the right to perform the ceremonies and "not the son's son also. This appears to agree also with a sloka quoted "in the 'Dharma Sindhu,' which is an abstract of the bigger work called "the 'Nirnaya Sindhu' (see page 261 of 'Dharma Sindhu' edited by "Kristnajee Ramachendra Sastri Ninare in 1888).

"I hold for these reasons that this work is no authority either for "one or the other party. But, upon other considerations already cited, "I think I may be justified in holding that the plaintiff has some "preferential right in him, and that, at all events, his rights are not "inferior to those of the third defendant."

In the result the Subordinate Judge passed a decree declaring that the alienations in question were not operative after the lifetime of defendant No. 1.

Defendant No. 3 preferred this appeal.

*Sivasami Ayyar*, for appellant.

*Pattabhirama Ayyar*, for respondent.

JUDGMENT.

This is a suit for a declaration that certain alienations made by the first defendant, the widow of one Vasudeva Pandithar, are not binding upon the plaintiff (respondent) as the nearest reversionary heir of Vasudeva. The third defendant (appellant) also claims to be Vasudeva's nearest reversionary heir. There is no dispute in this Court as to the actual relationship of these parties to Vasudeva. The plaintiff is the son of the maternal uncle of Vasudeva, and the third defendant is his sister's adopted son's son.

As to the plaintiff, it is not denied that he belongs to the first of the three classes into which bandhus, or cognate kindred entitled [346] to inherit the estate of a deceased man, are divided, *viz.*, his own or athma bandhus, his father's or pitru bandhus and his mother's or matru bandhus, inasmuch as the plaintiff is a relation of the exact description specifically mentioned by 'Vijnaneswara' as an athma bandhu (Mitakshara, Chapter II, Section VI, verse 1). As to the third defendant, the learned Vakil for the

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plaintiff urges that he is not Vasudeva's athma bandhu. But that he is such a bandhu seems to be necessarily implied by the passage of the Mitakshara cited above. For it lays down that the father's sister's son, that is, a descendant of even the paternal grandfather, is an athma bandhu. How then can a bandhu, like the third defendant, who is able to trace his relationship to the deceased owner through a nearer ancestor, *viz.*, the father, be held to be other than an athma bandhu? The plaintiff's objection on this point is, consequently, untenable.

The substantial question for determination is which of the two athma bandhus (whose rights are admittedly not equal) has the preferential title to the estate of Vasudeva?

The plaintiff's claim to such title was sought to be supported by two arguments. The first argument was this:—Vasudeva was the athma bandhu of the plaintiff while he was only the pitru bandhu of the third defendant; and the plaintiff's propinquity to Vasudeva should, therefore, be held to be greater than that which subsisted between Vasudeva and the third defendant. No decision or authoritative text was, however, cited in support of this argument. Since the question here is as to the title of the plaintiff to come in as the heir of Vasudeva, not as to Vasudeva's title to take the estate of the plaintiff, had the former been the survivor, the fact so much relied on, on behalf of the plaintiff must be treated as irrelevant to the exact point in issue, and, consequently, cannot be held to confer on the plaintiff a right to succeed in preference to the third defendant.

The second argument on behalf of the plaintiff was that the third defendant could not, and did not, confer any religious benefit on Vasudeva; while the plaintiff could, and did, confer such benefit, and therefore the plaintiff had the better claim.

In the argument this was discussed with reference to Vasudeva's participation in the offerings of cake and water made periodically by the plaintiff to two of his paternal ancestors and also with reference to the question whether either party or both were competent to perform the obsequies of Vasudeva in the absence of nearer relations.

[347] Now, with reference to the first of the abovementioned matters, the plaintiff's paternal grandfather and great-grandfather, to whom he has to present cake and water at stated times, being Vasudeva's maternal grandfather and great-grandfather, respectively, were, as such, entitled to similar oblations from Vasudeva also, who consequently participated in the offerings made by the plaintiff to those common ancestors. But on the other hand as between the third defendant and Vasudeva, there was no possibility of similar participation, since none of the persons to whom the third defendant has to make offerings were entitled to like dues from Vasudeva.

Next, with reference to the second matter, *viz.*, eligibility to perform the obsequies of Vasudeva, on behalf of the plaintiff no text expressly mentioning the son of the maternal uncle of a man as among those competent to celebrate that man's funeral rites was cited. But on behalf of the third defendant, a text quoted in Kamalakara's work on ceremonial law—the Nirnaya Sindhu—to the effect that a man's sister's son's son is eligible to perform the exequial rites of that man was relied on. The Subordinate Judge suggested that there was some mistake in the reading of the quotation in question. This view, however, seems to be scarcely well-founded inasmuch as the principal circumstances, relied on by the Subordinate Judge in favour of that view, *viz.*, that no other known text

refers similarly to the competency of a sister's grandson, is rather a slender foundation for the suggestion. 1897 JULY 20. — APPEL-LATE CIVIL. — 20 M. 342 = 7 M.L.J. 207.

In these circumstances it is not on the whole easy to lay down positively that, in a spiritual point of view, the difference between the two claimants is of a very pronounced character and that the plaintiff's capacity to confer religious benefits upon Vasudeva decidedly preponderates. But granting, as the Subordinate Judge seemed disposed to hold, though not very confidently, that the plaintiff's capacity is superior, does that give him a better title? Now, though the doctrine of religious benefit has exercised very much influence upon many of the great writers on Hindu Law, yet it is now rightly recognized that Vijnaneswara as well as most of his followers put their system on a radically different basis. (See 'Mayne's Hindu Law,' Sections 9 and 468 to 478 and *Suba Singh* v. *Sarafraz Kunwar* (1)).

**[348]** At the same time it must be admitted that a high authority of the same school—the Viramitrodaya—has given countenance to the view that the doctrine of religious benefit is not without its applicability even under the Mitakshara system (Chapter II, Part I, Section 2, page 158). ('Golap Chander Sircar's Translation.') In the Allahabad case just referred to, Knox, J., seemed inclined to hold that the doctrine of the Viramitrodaya is not entitled to any weight (pages 226—7), but Bannerji, J., is not inclined to go that length (page 229). In this Court the doctrine was not long ago referred to, and relied on, in support of the proposition that, as between bandhus of the same class, a rule of preference may be found in the spiritual benefit which they confer (*Muttusami* v. *Muttu Kumarasami* (2)). It may, therefore, perhaps be unsafe to hold that the doctrine in question can never be resorted to in dealing with difficult questions arising under the Mitakshara Law and for the solution of which no definite rule is stated expressly or by implication in the leading treatises of that school. But be this as it may, there need be no hesitation whatever in saying that the doctrine ought not to be resorted to in derogation of the great principles pervading the Law of Inheritance under the Mitakshara system. The first of such principles is that the nearer line excludes the more remote. Applying it here, the plaintiff must doubtless fail, since he traces his right as a bandhu through Vasudeva's grandfather (maternal), while the third defendant makes out his right through a nearer ancestor of Vasudeva, *viz.*, his father. The learned Vakil for the plaintiff laid considerable stress on the fact that the plaintiff is the grandson of Vasudeva's maternal grandfather, whereas the third defendant is the great grandson of Vasudeva's father. But it is not easy to see how this difference in the respective relationship affects the question under consideration. For, the competition here is not between persons descended from the same man, but between those who are seeking to establish their right through different persons, one of whom is unquestionably a nearer ancestor of the *propositus* than the other and whose line consequently must take precedence. If a more familiar illustration in support of so elementary a proposition were necessary, it is sufficient to refer to the case of a man dying leaving a divided nephew and a divided uncle. The nephew excludes the uncle though the **[349]** former is more removed from the father than the latter is from the grandfather of the *propositus*, the father and the grandfather being, of course, the respective common ancestors through whom the nephew and the uncle must respectively trace their right to inherit.

(1) 19 A. 215.

(2) 16 M. 23 = 19 M. 405 (P.C.).

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Another fundamental principle of the law in favour of the third defendant's preferable right is that among bandhus of a class those who are *ex parte paterna* take before bandhus *ex parte materna*. It is scarcely necessary to point out that though the mother's propinquity to her son is under the Mitakshara greater than that of the father, yet in the language of the Saraswathi Vilasa "the greater eligibility belongs to the mother alone, and "not to the mother's bhandhavas" (Paragraph 598, 'Foulkes's Translation') and this Court's ruling on the point in *Sundrammal* v. *Rangasami Mudaliar* (1) renders it superfluous to cite other authorities respecting it.

On both the above grounds, therefore, it is perfectly clear that the third defendant is a nearer reversionary heir of Vasudeva than the plaintiff; and as there was no allegation or proof of the existence of any circumstances which would entitle the plaintiff to maintain the declaratory suit as a remote reversioner, the suit must fail on this preliminary ground.

The appeal is accordingly allowed, the decree of the Subordinate Judge is therefore reversed, and the suit dismissed with costs of the third defendant in this and in the Lower Court.

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**20 M. 349 = 7 M.L.J. 213.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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MINAKSHI AMMAL (*Defendant* No. 6), *Appellant v.* KALIANARAMA RAYER (*Plaintiff*), *Respondent.** [9th March, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Sections* 317. 244—*Purchase by a benamidar with funds belonging to a joint Hindu family—Right of member of family not being a party to benami transaction to sue for his share.*

A Hindu sued for partition of his share of the family property and obtained a decree which he partially executed. He then died without issue, leaving [350] a widow. The rest of the family remained undivided, and the plaintiff was born into it after the decree was passed. Some of the members of the family arranged for the purchase of the late decree-holder's property with their money *benami* for them and for a similar purchase of other portions of the family property at Court-sales held a further execution of the decree. The plaintiff now sued for partition of *inter alia* those portions of the family property which had been the subject of the *benami* transactions :

*Held*, that the plaintiff was entitled to share therein and was not precluded from asserting his right by Civil Procedure Code, Section 244, or Section 317.

[F., 9 M.L.J. 298; R., 17 Ind. Cas. 434 (436) = (1912) M.W.N. 1071; U.B.R. (1905) p. 36 (Civil Procedure).]

APPEAL against the decree of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, in original suit No. 13 of 1894.

The plaintiff, a minor, sued by his next friend to recover one-fourth share of the properties belonging to a joint Hindu family, consisting of himself, his three brothers, defendants Nos. 1 to 3, and the infant sons of defendants Nos. 2 and 3.

The only question between the parties necessary to be mentioned for the purposes of this report was the question between the plaintiff and the sixth defendant, which was raised on the following facts :—

Another brother (Krishna Row) of the plaintiff and defendants Nos. 1 to 3 had instituted a suit for partition against his father (now dead)

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* Appeal No. 95 of 1896.

(1) 18 M. 193.

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and defendants Nos. 1 to 3, the present plaintiff at that time not having been born, and obtained a decree for one-fifth share in the family properties. Krishna Row obtained possession of certain properties under this decree, but, before the decree was fully satisfied, he died without issue, leaving a widow. The widow entered upon the properties which her husband had obtained under the decree. Some time after, the widow conveyed to the sixth defendant the properties obtained by her husband and all her interest in the decree in favour of her husband. The purchase by the sixth defendant was *benami* and the purchase money was provided by the first and second defendants out of family funds. Subsequently the sixth defendant took out further execution of the partition decree in favour of Krishna Row, and caused certain family properties to be sold in Court-sale and purchased them *benami* with money provided by first and second defendants out of family funds. The plaintiff was not a party to the *benami* transactions.

The sixth defendant denied that the transactions were *benami*, and as to the purchases in court-sale relied on Section 317, Civil Procedure Code, and contended that the question raised by plaintiff **[351]** ought to have been raised in execution proceedings under the decree in favour of Krishna Row.

The Subordinate Judge then dealt with issues as follows :—

"Is the plaintiff entitled to a share in the disputed properties, —I "mean such as were bought in Court auction,—or is he barred from claim- "ing it either by Section 317 or Section 244 of the Civil Procedure Code? "These are the questions raised in the last two additional issues and they "were raised on behalf of the sixth defendant. It seems to me that, so "far as the present plaintiff is concerned, neither of these sections apply "to shut him out and bar him from recovering his share of the lands "bought in this Court's auction in the sixth defendant's name. Though "he was a party to the decree, he was no party to the arrangement by "which this sham purchase was made in the sixth defendant's name, and "his object is not to set it aside as made in fraud of his rights as a mem- "ber of the family to whom the purchase money belonged. *Natesa* v. "*Venkatramayyan* (1) is on all fours with the facts of these cases, and it "was there held that Section 317 would not operate as a bar.

"The Privy Council case in *Bodh Singh Doodhooria* v. *Gunesh Chunder* "*Sen* (2), on which the sixth defendant's vakil relies, was considered in "the Madras case above quoted, and was distinguished, and I cannot "find it to apply to the present case.

"In *Monappa* v. *Surappa* (3) the facts were that a purchaser in a "court-sale acknowledged he was a *benami* purchaser and gave up pos- "session and after some time went to eject the true owner, when the true "owner next sued, he sought to defend his possession by relying on "Section 317.

"In such a case too, the Court held that that section was no bar and "what do we find the facts here established? The sixth defendant did "not claim any right as purchaser, though proceedings were had in her "name, and she was only given possession not under the process of Court, "but by the second defendant in fraud of plaintiff's rights long after the "sale. She cannot plead that the possession thus given her was had under "her rights as Court purchaser and seek the protection afforded by Sec- "tion 317 as against the plaintiff.

(1) 6 M. 135. (2) 19 W. R. 356. (3) 11 M. 234 (235).

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[352] "The cases of *Kanizak Sukina* v. *Monohur Das* (1) and *Subha* "*Bibi* v. *Hari Lal Das* (2) also support the plaintiff, and although the "former case was dissented from by his Lordship the Chief Justice and "Mr. Justice Handley in *Rama Kurup* v. *Sridevi* (3); it was said that "so far as it related to Section 317, it was an *obiter dictum*, whether it "was so or not, their Lordships did not consider the two earlier Madras "cases reported in the sixth and eleventh volumes and did not dissent "from them.

"Section 244 of the Civil Procedure Code too cannot bar the present "suit. It was contended that as the minor plaintiff was a party to the "decree in execution of which these properties were sold; if the sale was "brought about improperly, he ought to apply under Section 244 to have "the sale set aside and not bring a separate suit. Reliance was placed on "*Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (4), *Mohendro Narain Chatu*-"*raj* v. *Gopal Mondul* (5), and *Krishnan* v. *Arunachalam* (6). It seems to "me that the object of the present suit is not to set aside the sale but to "have it declared that the purchase made was *benami*, with the aid of "family funds and also that all proceedings had under that decree were "sham and colorable, inasmuch as that decree had been discharged by "payment made from family funds. The Madras ruling quoted is not in "point. The question considered and decided in it was one which arose "in relation to the execution of a decree whether some properties, in the "hands of a representative of a judgment-debtor, were or were not liable "for the same.

"In *Mohendro Narain Chaturaj* v. *Gopal Mondul* (5) it was cer-"tainly held that 'when circumstances affecting the validity of a sale in "'execution have been brought about by the fraud of one of the parties "'to the suit and give rise to a question between these parties "'such as, apart from fraud, would lie within the provisions of Section "'244, a suit will not be to impeach the validity of the sale on the "'ground of such fraud' and 'that in such a case, the judgment-debtor is "'entitled, whether the sale has been confirmed or not, to make against "'the person guilty of the fraud or accessary thereto, such application, if "'any, under Section 311 as he may be entitled to make, his time for "'[353] making it being computed from the time when the fraud first "'became known to him.' It was also held in the same case that 'in "'cases in which the decree of the purchase is made *benami*,' Section "244 did not apply and a suit might be brought to set aside the sale.

"The present case falls under this last rule. Though the decree was "not passed *benami* the transfer of it and all proceedings had under that "transfer have been alleged and found to be benami.

"The Privy Council ruling in *Prosunno Kumar Sanyal* v. *Kali Das* "*Sanyal* (4) does not further limit this rule. It simply held that even "the rights of a stranger purchaser must be enquired into under Section "244 whenever that section applied."

Defendant No. 6 preferred this appeal.

*Pattabhirama Ayyar* and *Mahadeva Ayyar*, for appellant.

*Krishnasami Ayyar*, for respondent.

## JUDGMENT.

The Subordinate Judge has given excellent reasons founded on clear documentary and oral evidence, for his conclusion that the transfers to

(1) 12 C. 204. (2) 21 C. 519. (3) 16 M. 290.
(4) 19 C. 683. (5) 17 C. 769. (6) 16 M. 447.

the sixth defendant were *benami* for the family of the plaintiff and defendants Nos. 1 to 3. These reasons have not been shown to be incorrect in the argument before us. We concur in the finding of the Subordinate Judge on this issue. As to the effect of Section 317 of the Civil Procedure Code with regard to the plaintiff's right to maintain the present suit to recover his share of the family property, we observe that the present case is governed by the decision in *Natesa* v. *Venkatramayyan* (1). That case is exactly on all fours with the present case, and has not been overruled or dissented from in the cases referred to by the appellant's vakil *Rama Kurup* v. *Sridevi* (2) *Sankunni Nayar* v. *Narayanan Nambudri* (3) *Kumbalinga Pillai* v. *Ariaputra Padiachi* (4).

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Lastly, on the finding that the sixth defendant was not the real transferee of the decree, no question as to the effect of Section 244, Civil Procedure Code, on the plaintiff's right to maintain this suit can arise. We must, therefore, confirm the decree of the Subordinate Judge and dismiss this appeal with costs.

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**20 M. 354 = 7 M.L.J. 240.**

## [354] APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.*

PONNAMBALA PILLAI (*Plaintiff*), *Appellant v.* SUNDARAPPAYYAR (*Defendant*), *Respondent.** [26th and 29th July, 1897.]

*Hindu Law—Conditional contract to sell family lands—Birth of vendor's son before fulfilment of condition.*

A Hindu entered into a contract to sell certain land, being family property of which he was not in possession, as soon as possession should be obtained. Before possession was obtained a son was born to him. A decree for specific performance was passed and executed against him, the son not being brought on to the record. In a suit by the son for partition of the property in question :

*Held*, that the plaintiff had an existing right in the property which was not bound by the decree and the subsequent proceedings, and that he was entitled to the relief sought.

*Semble* : That a contract for sale of land made by a Hindu before a son is born to him is not binding on the son born before the transfer of the property takes place.

[R., 17 C.L J. 38 = 17 C.W.N. 280 (288).]

SECOND appeal against the decree of T. M. Horsfall, District Judge of Tanjore, in appeal suit No. 255 of 1895, confirming the decree of T. Venkataramayya, District Munsif of Kumbakonam, in original suit No. 422 of 1893.

The plaintiff sued for partition and possession of a moiety of certain land together with mesne profits. The property in question had belonged to the family of the plaintiff. He however was not born until 1874, before which date certain transactions had been entered into between his father and uncle, since deceased, and the present defendant. In 1872 the father and uncle agreed to sell to defendant their family lands in a certain village including the property now in question, and later on in the same year they executed a conveyance of so much of the property as was

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* Second Appeal No. 754 of 1896.

(1) 6 M. 135. (2) 16 M. 290. (3) 17 M. 282. (4) 18 M. 436.

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then in their possession, and therein expressed their willingness to execute a sale-deed in respect of the rest of the land, of which they expected to get possession, as soon as that should happen. Possession was obtained in 1877, but the plaintiff's father refused to convey, and a suit for specific performance [355] was brought against him. In this suit to which the present plaintiff was not a party, a decree was passed as prayed, and in the result the land of which partition is now sought was conveyed to defendant.

It was not found that the sale was justified by circumstances of family necessity, but both the Lower Courts held that the plaintiff was not entitled to recover. The District Judge expressed the view that the transaction based on the contract of 1877 was inseparable from that of 1872 and was therefore binding on the plaintiff who was not born at the last-mentioned date.

The plaintiff preferred this appeal.

The Acting Advocate-General (Hon'ble *V. Bhashyam Ayyangar*) and *Kristnasami Ayyar*, for appellant.

*Pattabhirama Ayyar*, for respondent.

## JUDGMENT.

The facts of this case lie in a small compass and there was so little dispute about them that no issues of fact were raised in the Court of First Instance. In 1872 before the birth of the plaintiff, his father together with his brother Saminada having certain debts to pay off entered into an oral contract with the defendant to sell to him their family lands in the village of Anakkudi and their share of the palace in the same place for the sum of Rs. 29,000. On the 10th May 1872 the vendors wrote to the defendant the letter marked XVIII. In it they say that three velies and odd have not yet been delivered into their possession under the Court decree and they ask the defendant to let the matter stand over and take a sale-deed in respect of the remaining properties for Rs. 25,000, expressing their willingness to execute a sale "in respect of the said maniam "punjah, &c., lands for a sum of Rs. 3,500 as soon as we get possession of "the same." To this request the defendant acceded, and accordingly a conveyance in his favour was executed on the 12th May 1872, comprising the other lands included in the contract and expressed to be in consideration of the sum of Rs. 25,500, details of which are given in the document. The proceedings in the partition suit referred to in the letter XVIII are not before us. But it appears from the exhibits put in by the defendant (XIV and XV) that it was in May 1872 uncertain what share of the punjah lands would fall to the vendors, and that, in the result, they did not get the lands which they expected to get. This did not happen till February 1877 before which date the plaintiff had been born and his father's brother [356] had died. By that time the plaintiff's father had repented of his bargain and accordingly he refused to convey to the defendant the punjah lands of which he came into possession. The result of this conduct was a suit for specific performance brought by the present defendant. This litigation went on during 1880 and 1881 and ended in a decree against the plaintiff's father. The plaintiff himself was not joined in this suit, and it is quite impossible to hold, as was argued by the respondent's vakil, that the plaintiff was in any way represented in the suit by his father. Now, in this suit instituted soon after the plaintiff came of age, he claims a moiety of the property conveyed to the defendant in pursuance of the decree for specific performance made against his father. The plaintiff's case is that,

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inasmuch as he was born before the decree was passed or the conveyance executed, and the sale of the property was not necessitated by the exigency of any debt pressing on his father, he being by birth a coparcener with his father is entitled to repudiate the sale so far as his moiety is concerned. The District Judge appears to have based his judgment in the defendant's favour on the ground that the sale was made under the original contract and that as the plaintiff was bound by the sale made on the 12th May 1872, so he must be bound by the further sale made in pursuance of the same contract. It has not been found by either Court that there was any necessity for the sale impeached by the plaintiff. The defendant's case must therefore be rested on the ground that a contract for sale made by a Hindu before a son is born to him is binding on the son notwithstanding that the latter is born before the transfer of the property takes place. No authority was cited for this position, and we do not think it can be maintained. The son of a Hindu on his birth becomes a coparcener with his father in respect of family property. This right of the son may be defeated, or rather is prevented from coming into existence, by an alienation of the property made before the son's birth. We are asked now to hold that a mere contract for sale operates as an alienation, and that in the suit which may be brought on that contract by the purchaser the son has no other defence than the father would have. In support of the argument reference is made to the doctrine of equity according to which the purchaser under a contract for sale is for certain purposes regarded as the owner of the property. If otherwise this doctrine has any application we do not see how it can avail the defendant and alter the **[357]** fact that his vendor's interest in the property was liable to be diminished by the birth of a son. It is not as if the son claimed through the father. A purchaser in the position of the defendant before actual transfer of the property is in no worse position than the purchaser from a coparcener of an undefined share. As the latter takes subject to the chance of the vendor's share being diminished before partition takes place, so a purchaser in the defendant's position, contracting with one whose interest is liable to diminution, must take subject to that liability.

But the whole argument for the defendant rests on the assumption that the contract enforced by the suit of 1880 was the original contract of 1872. We think this is a complete mistake. On the acceptance of the offer made in the letter already mentioned a new contract with new incidents was effected with regard to the lands which the plaintiff's father was not then in a position to deliver. In that new contract there was a condition which was not fulfilled until long after the plaintiff's birth. It is impossible, therefore, to hold that at the date of his birth there was no property in existence to which the plaintiff's right could attach. On the ground that the property of which partition has now been claimed had not passed from the family when the plaintiff was born, we must hold that the plaintiff is entitled to the decree for which he asks. It is suggested that he ought to be put upon terms and that it should be assumed that his share of the purchase money came to his hands. This, however, is a point which ought to have been taken in the Court of First Instance and made the subject of an issue. It cannot be assumed that the plaintiff has become possessed of any part of the purchase money, and there is admittedly no evidence to support the observation made on the point by the District Judge.

The decree must be reversed and a decree passed in favour of the plaintiff; and the respondent must pay the costs in all the Courts.

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7 M.L.J. 140.

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## [358] APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

SESHAMMAL (*Plaintiff*) *Petitioner v.* MUNUSAMI MUDALI (*Defendant*), *Respondent.** [26th October, 1896.]

*Presidency Small Cause Courts Act—Act* XV *of* 1882, *Sections* 37, 38, 69—*Stating Case on applcation for a new trial.*

When, upon an application to the Presidency Small Cause Court for a new trial, the Judges differ in their opinion as to any question of law and the majority without ordering a new trial reverse the decree of the Judge who tried the suit, the Court is bound to state a case for the opinion of the High Court under Section 69 of the Presidency Small Cause Courts Act.

[F., 31 M. 490=18 M.L.J. 480=4 M.L.T. 283.]

PETITION under Section 622 of the Code of Civil Procedure praying the High Court to revise the decree of the Presidency Court of Small Causes, Madras, in suit No. 19335 of 1892.

The plaintiff, the wife of the defendant, sued in the Presidency Small Cause Court to recover Rs. 310 expended by her on the marriage of their daughter. The case was tried by the Chief Judge who gave the plaintiff a decree. The defendant on 30th November 1894 applied to the Full Court for a new trial. The Chief Judge adhered to his view that the plaintiff was entitled to sue for the money expended, but the other Judges of the Court held that the suit was not maintainable. In the result the Court reversed the decree of the Chief Judge.

The plaintiff preferred this petition.

*Kothandaramayyar*, for petitioner.

*Pattabhirama Ayyar*, for respondent.

### JUDGMENT.

The plaintiff sued in the Presidency Small Cause Court, and her claim was decreed by the Chief Judge. Under Section 37 of the Act the defendant made an application for a new trial, and the Small Cause Court, consisting of the Chief Judge and two other Judges, heard the application, and in doing so went into the merits of the case. The Chief Judge differed from his colleagues on a point of law, and still maintained that the claim should be decreed, but his colleagues taking a different view on [359] the point of law, the Court reversed the decree passed by the Chief Judge and gave judgment for defendant with costs.

Plaintiff now puts in this revision petition under Section 622, Civil Procedure Code, on the ground that, as the Judges differed on a point of law, they were bound, under Section 69 of the Presidency Small Cause Courts Act, to refer the case for the opinion of the High Court and either to reserve judgment or deliver a judgment contingent upon such opinion.

We think the petition must be allowed. The provision of Section 69 is imperative, it says: "If two or more Judges sit together in any "suit . . . and differ in their opinion as to any question of law. . ". . the Small Cause Court shall draw up a statement of the facts of "the case, and refer such statement . . . for the opinion of the High

* Civil Revision Petition No. 784 of 1895.

"Court, and shall either reserve judgment or give judgment contingent "upon such opinion." 1896 OCT. 26.

It is contended for the counter-petitioner that the difference of opinion now in question did not arise "in any suit," so as to come within the purview of Section 69, but only on an application under Section 37, and it is pointed out that it has been held in the cases of *Oakshott* v. *The British India Steam Navigation Company* (1), *Nusserwanjee* v. *Pursutum Doss* (2), and *Hall* v. *Joachim* (3), that the Small Cause Court cannot state a case for the opinion of the High Court on an application for a new trial under Section 37 of the Act. The fallacy in this argument lies in not observing that in the present case the Full Small Cause Court did more than consider the application for a new trial. No doubt the cases quoted are an authority for holding that, while the Court is considering whether a new trial shall be granted or not, Section 69 has no application, but, in our opinion, when the Court goes further and proceeds to deal afresh with the merits of the case, it must be held that the new trial has been granted, and that the Court is thenceforward engaged in trying the suit. In all the above-quoted cases the application was rejected, so that Section 69 could not, in any way, apply; but in the present case though no separate order formally granting a new trial was made, yet such new trial was, by necessary implication, granted before the Court proceeded to re-hear the suit. The cases quoted are, **[360]** therefore, no authority for the counter-petitioner's contention. Indeed in every one of them it is assumed that, if a new trial had been granted, the reference to the High Court could properly have been raised, and we have no doubt, but that that assumption is correct.

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20 M. 358 = 7 M.L.J. 140.

We must, therefore, set aside the revised decree of the Small Cause Court with costs, and direct that the suit be restored to its file, and be dealt with in accordance with law as laid down in Section 69 of the Presidency Small Cause Courts Act. As the Chief Judge who was a party to the decree now set aside is absent on leave, but will shortly return, it is desirable that the case should not be taken up for reference until his return.

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**20 M. 360.**

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

SINGA REDDI OBALA REDDI (*Plaintiff*), *Appellant* v. MADAVA RAU (*Defendant No. 1*), *Respondent*.*
[9th October, 1896.]

*Civil Procedure Code—Act XIV of* 1882, *Sections* 32, 45, 46—*Dismissal of suit against one defendant without trial after first hearing.*

The plaintiff sued for damages for the infringement of certain hereditary rights claimed by him in connection with a temple. The first defendant was a Magistrate and it was alleged as the cause of action against him that he had disobeyed the instructions of his superiors and played into the hands of the other defendants by passing an illegal order. After issues had been framed the Judge without trial dismissed the suit with costs against the first defendant:

*Held*, that the order was illegal.

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* Appeal against Order No. 34 of 1896.

(1) 15 M. 179. (2) 11 C. 293. (3) 12 B.L.R. 34.

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Appeal against the order of W. G. Underwood, District Judge of Cuddapah, in original suit No. 4 of 1895.

The plaintiff claimed that he had hereditary rights connected with the festivals of a certain temple, and he sued for damages for the infringement of those rights.

Paragraphs 2, 3, 4 and 5 of the plaint, were as follows:—

"The second and third defendants who are Komatis induced the fourth "defendant to acquiesce in their attempts to break the abovementioned "time-honoured custom and invented, after their [361] recent accession "to the office of Dharmakartaship of the temple, frivolous and flimsy pre-"texts for disgracing the plaintiff."

"The first defendant, who was directed by the Deputy Magistrate of "Jammalmadugu Division to hold the scales evenly in this contentious "state, disobeyed the plain instructions issued to him on 21st May 1894 "and played himself into the hands of the other defendants by passing an "illegal order on 25th May 1894 authorising the conduct of the fes-"tivals interdicted in spite of the fact that no reconciliation had taken "place."

"When the minor plaintiff and his next friend appeared on the night "of the abovesaid 25th May 1894 at the Papagni river-bed on the occasion "of Garudotsavam and claimed the customary honours of Tomalai, the "first defendant abused his official authority and had them dragged by "sheer force and thereby disgraced and lowered them immensely in the "eyes of the assembled multitude besides wounding their feelings.

"The wanton, malicious and vindictive refusal on the part of all "defendants to render the customary honours to the plaintiff, was further "aggravated by the high-handed, arbitrary and illegal proceedings of the "first defendant and has resulted in the extreme disgrace to the highly "respectable and wealthy family of the plaintiff."

Defendant No. 1 filed a written statement denying the plaintiff's allegations as far as they affected him, and the District Judge, after issues were framed between the plaintiff and all the defendants, made the order now appealed against by which the suit was dismissed against the first defendant in the following terms:—

"I think I am right in dismissing K. Madava Rau from this suit with "costs. I do so accordingly. If he violated his powers as a Magistrate, "a case will undoubtedly lie against him. But that has nothing to do with "the present cause of action. The suit is wholly on the rights in the "ceremonies, and it remains for the Court to decide if the dispute is "wholly religious or a matter in which a secular Court can take cognizance "and decide the issues raised or whether the matter should be settled in "the caste."

The plaintiff preferred this appeal.

*Tiagarajayyar*, for appellant.

Mr. *J. G. Smith*, for respondent.

## JUDGMENT.

We do not understand under what provision of law the District Judge passed the order appealed against. Section [362] 32, Civil Procedure Code, gives the Court power to strike out the name of any defendant who has been improperly joined as a party, but that must be done on or before the first hearing. In the present case, the order was not made until some time after the issues were settled. Again if it appeared to the Court that the cause of action alleged against first defendant alone, and

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that alleged against him jointly with the other defendants, could not be conveniently tried together, the Court might have proceeded under Section 45, Civil Procedure Code, and have ordered the several causes of action to be tried separately ; but (unless the parties otherwise agreed, which was not alleged in the present case) this power also could only be exercised before the first hearing.

Lastly, the first defendant might have applied under Section 46, Civil Procedure Code, to confine the suit to such cause or causes of action as could be conveniently tried together. The District Judge does not appear to have acted under this section ; for he has not confined the suit as contemplated by that section, but has dismissed it all together with costs as against the first defendant.

The District Judge has assigned no legal grounds for making such an order, and we can discover none in the papers before us.

We must, therefore, set aside the order of the District Judge and direct him to restore the suit as against this first defendant to his file, and proceed to dispose of it in accordance with law. Costs will abide and follow the result.

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**20 M. 362.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

KOLLANTAVIDA MANIKOTH ONAKKAN (*Plaintiff*), *Appellant v.* TIRUVALIL KALANDAN ALIYAMMA AND OTHERS (*Defendants*), *Respondents.**

[25th February and 4th March, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Section* 317—*Execution sale—Right to prove purchase benami.*

Certain property was mortgaged in 1881 and again in 1882. In 1883 the interest of one of the mortgagors in the property was brought to sale subject **[363]** to the mortgages in execution of a decree against him, and was purchased by the assignor of defendant No. 6. In 1884 a decree for sale was obtained on the mortgage of 1882, neither defendant No. 6 nor his assignor having been brought on to the record. In execution of that decree the property now in question was purchased by the predecessor in title of the plaintiff who now brought this suit for redemption, averring that the purchase of 1883 was *benami* for the mortgagors.

*Held*, that the plaintiff was not debarred by Civil Procedure Code, Section 317, from proving this averment.

SECOND appeal against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No. 467 of 1894, affirming the decree of A. Annasami Ayyar, District Munsif of Panur, in original suit No. 17 of 1894.

Suit to redeem a kanom, dated 22nd March 1881, and executed in favour of defendant No 1. In February 1882 the mortgagors hypothecated certain property including the property now in suit to one Kunju Narayanan Nambiar, who obtained a decree for sale in 1884. In July 1885 in execution of that decree the property was brought to sale, and that portion of it which was now in question was purchased by defendant No. 5, who in October 1888 transferred his rights therein to the plaintiff's sister. The

* Second Appeal No, 1731 of 1895.

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plaintiff's sister subsequently died and this suit was brought by the plaintiff as her representative and as the karnavan of the tarwad. Meanwhile, *viz.*, in 1883, in execution of a decree against one of the mortgagors, his interest in the property now in question was brought to sale subject to the mortgages of 1881 and 1882, and was purchased by one Rama Kurup who assigned his right in 1888 to the present defendant No. 6, but he was not made a party to the suit in which the decree for sale was passed. The plaintiff now averred that Rama Kurup had purchased benami for the two mortgagors. This averment the District Munsif held could not be entertained with reference to Civil Procedure Code, Section 317, and as the plaintiff objected to opportunity being given to defendant No. 6 of redeeming the mortgage of 1882, he dismissed the suit. His decree was affirmed on appeal by the District Judge. The plaintiff preferred this second appeal.

Mr. *Krishnan* and *Vaithinatha Ayyar*, for appellant.

*Ryru Nambiar*, for respondent No. 6.

## ORDER.

The plaintiff is the assignee of the rights of a purchaser in a Court-sale held in 1885, under a decree obtained in 1884 upon the hypothecation (Exhibit C, dated 23rd February 1882). The sixth defendant (respondent) purchased the right, title [364] and interest of apparently one of the mortgagors (in Exhibit C) in execution of a Small Cause Court decree in 1883, but was not made a party to the suit or Exhibit C. The question is whether the plaintiff is entitled to show that the sixth defendant purchased *benami* for the mortgagors in C. Both the Lower Courts have held that he is not so entitled. Under the purchase in the suit or Exhibit C, the plaintiff has acquired the rights not only of the mortgagors, whatever they were in 1885, but also the rights of the mortgagee under Exhibit C., as they stood on its date, *viz.*, 23rd February 1882. It is contended for the respondent that under Section 317, Civil Procedure Code, as interpreted in *Rama Kurup* v. *Sridevi* (1), no person, under any circumstances, may prove that the certified auction-purchaser was not the real purchaser; but this is opposed to the conclusions arrived at in *Natesa* v. *Venkataramayyan* (2), and *Ramakrishnappa* v. *Adinarayana*(3). In the former it was held that Section 317 does not bar the son of a Hindu father from proving in a suit for partition that the certified purchaser was acting *benami* for the father. In the latter it was held that a person who did not claim under the *benami* purchaser was not precluded by Section 317 from showing the real character of the purchase. There can be no doubt but that the mortgagee under Exhibit C, as a person not claiming under either of the parties to the *benami* purchase, was entitled in the suit instituted by him on the mortgage to show, if necessary, the true nature of the purchase.

Consequently, the present plaintiff, as occupying his place, is equally so entitled.

We must, therefore, ask the District Judge to find whether the purchase by the sixth defendant was *benami* for the mortgagors as alleged on behalf of plaintiff. If the finding on the above issue is in favour of the sixth defendant, we will ask the District Judge to find further whether the sixth defendant acquired by his purchase the right of both the mortgagors (Nambiars) or only of one of them against whom the decree was passed.

(1) 16 M. 290. (2) 6 M. 135. (3) 8 M. 511.

Fresh evidence may be taken on these issues on both sides. Finding is to be returned within two months of receipt of this order, and seven days will be allowed for filing objections after notice of the receipt of the finding has been posted up in this Court.

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20 M. 365.

## [365] APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

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NARASIMMA CHARIAR (*Plaintiff*), *Petitioner v.* SINNAVAN (*Defendant*), *Respondent.** [6th November, 1896.]

*Legal Practitioners Act—Act XVIII of* 1879, *Section* 28—*Oral agreement for pleader's remuneration—Criminal Proceedings*—"Quantum meruit."

A pleader was retained by an accused person to conduct his defence. The accused did not pay the agreed fee and the plaintiff whereupon declined to conduct his defence. The defendant who was one of the accused, then undertook orally to pay the fee, but failed to do so after the plaintiff had conducted the defence of both accused persons. The plaintiff now sued the defendant to recover the agreed amount :

*Held*, that, under Legal Practitioners' Act, Section 28, the plaintiff was not entitled to recover on the contract, but that he was entitled to recover reasonable remuneration for the services rendered by him.

PETITION under Section 25 of the Provincial Small Cause Court Act praying the High Court to revise the decree of K. Krishnamachariar, District Munsif of Madura, in small cause suit No. 1480 of 1895.

The plaintiff was a First-grade Pleader, and he sued to recover Rs. 25 under the following circumstances. One Mathuranayagam Pillai retained the plaintiff to defend him in a criminal case, but failed to pay his fee whereupon the plaintiff refused to appear for him. Thereupon the defendant, who was also on his trial in the same case, undertook to pay the plaintiff Rs. 25, the fee agreed to be paid by Mathuranayagam Pillai. Relying upon this undertaking the plaintiff conducted the defence, but the defendant failed to pay the amount for which this suit was accordingly brought.

The District Munsif dismissed the suit; holding, with reference to Legal Practitioners Act, Sections 28 and 29, and *Sundararaja Ayyangar* v. *Pattanathusami Tevar* (1), that the claim could not be supported on the oral contract alleged by him ; and he expressing the opinion that under the circumstances, the plaintiff was not entitled to bring this suit to recover *quantum meruit*, and declined to consider the plaintiff's claim on that footing.

The plaintiff preferred this petition.

[366] *Mahadeva Ayyar*, for petitioner.

*Srirangachariar*, for respondent.

### JUDGMENT.

We agree with the District Munsif that Section 28 of the Legal Practitioners Act is applicable. The plaintiff may, however, recover

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* Civil Revision Petition No. 73 of 1896.

(1) 17 M. 306.

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reasonable remuneration for the work done by him for the benefit of the client on the principle *quantum meruit*, *Krishnasami* v. *Kesava* (1).

The District Munsif refused to go into this question on the ground that the person benefited, *viz.*, the second defendant, in the criminal case, was no party to the present suit. We observe, however, that the plaintiff would not have gone into Court at all but for the guarantee given by the first defendant, and the latter would have been in that case undefended. The first defendant then derived benefit from the plaintiff going into Court to defend him and the second defendant jointly. We think, therefore, that the plaintiff may recover reasonable remuneration for the services he rendered. We therefore set aside the decree of the District Munsif with costs and direct him to restore the suit to his file and dispose of it on the merits.

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20 M. 366.

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

LINGUM KRISHNABHUPATI DEVU (*Petitioner*), *Appellant v.* KANDULA SIVARAMAYYA (*Counter-petitioner*), *Respondent.**
[16th October, 1896.]

*Civil Procedure Code--Act XVI of* 1882, *Sections* 243, 588—*Stay of execution pending suit between decree-holder and judgment-debtor—Stay of execution refused—Appeal.*

An appeal lies from an order refusing stay of execution under Civil Procedure Code, Section 243, pending a suit between a decree-holder and his judgment-debtor.

[R., 14 C.L.J. 489 (495) ; 8 C.W.N. 257 ; 41 P.R. 1904 = 59 P.L.R. 1904.]

APPEAL against the order of H. R. Farmer, District Judge of Vizagapatam, in miscellaneous petition No. 78 of 1896.

This was a petition under Section 243 of the Code of Civil Procedure preferred by the judgment-debtor in original suit No. 11 [367] of 1883, praying that the execution of the decree in that suit be stayed pending disposal of a suit instituted by him against the decree-holder.

The District Judge in his order said: "Under the circumstances I "resolve to refuse to stay execution absolutely under Section 243, but, at "the request of counter-petitioner's pleader, a month's time will be given "him to apply to the High Court . . . . If no orders staying execution "are received from the High Court within a month and if no further time "be granted execution will proceed."

The judgment-debtor preferred this appeal.

Mr. *Adam* and *R. Subramania Ayyar*, for appellant.

*Ramachandra Rau Saheb*, for respondent.

## JUDGMENT.

A preliminary objection is taken on the ground that the order appealed against was passed under Section 243 of the Civil Procedure Code, and that no appeal lies against such an order. We do not think that this contention can be upheld. Following the reasoning and the rulings in the

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* Appeal against Order No. 52 of 1896.

(1) 14 M. 63.

cases of *Ghazidin* v. *Fakir Bakhsh* (1), *Kassa Mal* v. *Gopi* (2), *Steel & Co.* v. *Ichchamoyi Chowdhrain* (3), we hold that an appeal lies. We therefore disallow the preliminary objection.

As to the merits, the District Judge states that he does not consider that the appellant will have difficulty in recovering any sum that may now be paid over to the respondent in execution of the decree. The decree was passed as long ago as 1883. We dismiss this appeal with costs.

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**20 M. 367=7 M.L.J. 59.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.*

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RANGAYYA APPA RAU (*Plaintiff*), *Appellant v.*
KAMESWARA RAU AND ANOTHER (*Defendants*). *Respondents.**
[29th October and 6th November, 1896.]

*Registration Act—Act III of* 1877, *Section* 17—*Deed of relinquishment by tenant to land-holder.*

An instrument by which a tenant in a zemindari, in consideration of the zemindar waiving his right to arrears of rent accrued due, relinquishes the land [368] to him, is not admissible in evidence, unless it is registered in accordance with law, although it may have been drawn up and delivered to the servants of the zemindar before he had signified his consent to waive his right to the arrears.

[R., 14 C.P.L.R. 29.]

SECOND appeal against the decree of E. A. Elwin, Acting District Judge of Kistna, in appeal suit No. 1567 of 1893, affirming the decree of M. Venkataratnam, Acting District Munsif of Gudivada, in original suit No. 160 of 1892.

Plaintiff was a zemindar and he sued for a declaration of his title to, and for possession of, certain land forming part of the zemindari, of which defendant No. 1 had been in possession as tenant. It appeared that the tenant, having fallen into difficulties, executed a document on the 20th June 1888 addressed to the plaintiff in the following terms :—"To the zemindar, "&c., relinquishment report put in by Govindarazulu Kameswara Rau, cul-"tivator of Gurazada. Being unable to cultivate the 16 acres 84 cents of "dry land and 7 acres and 87 cents of wet land, 24 acres and 72 cents in "all, which I have been cultivating in the village of Gurazada, and, finding "it inconvenient to pay the arrears on it, I have relinquished the right to the "Sirkar (*i.e.*, the zemindar). I agree to the removal of that land from the "village accounts in my name for fasli 1298 and to your disposing of the "same at your pleasure without my having anything to do with the arrears "of Rs. 600 and odd due thereon. This relinquishment report is put in "with consent." Subsequently defendant No. 1 executed in favour of defendant No. 2 a mortgage of the land in question upon which a decree was obtained by the mortgagee in original suit No. 176 of 1889, and in execution of the decree the land was brought to sale and part of it was purchased by the decree-holder.

The plaintiff's case was that the instrument of mortgage did not represent a real transaction and that the proceedings in the previous suit

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* Second Appeal No. 925 of 1895.

(1) 7 A. 73. (2) 10 A. 389. (3) 13 C. 111.

1896 Nov. 6. — APPELLATE CIVIL. — 20 M. 367 = 7 M.L.J. 59.

were collusive. The instrument of 1888 was unregistered. On that ground the District Munsif declined to receive it in evidence and dismissed the suit. His decision was upheld on appeal by the District Judge.

The plaintiff preferred this second appeal.

*Sundara Ayyar* and *Ramasubba Ayyar*, for appellant.

*Pattabhirama Ayyar*, for respondents.

JUDGMENT.

If the document in question was nothing more than a mere relinquishment presented by a tenant, the first defendant, to his landlord, the plaintiff, under Section 12 of Act VIII of 1865, which authorises the former to relinquish his holding at the [369] end of any revenue year by a writing signed in the presence of witnesses irrespective of the wishes of the landlord in the matter, there can be no doubt that the document did not require to be registered under Section 17 of the Indian Registration Act. But that the document was one given for a consideration which moved from the plaintiff to the first defendant, *viz.*, the waiver by the former of his right to the arrears of rent amounting to Rs. 600 due at the time of the relinquishment is clear from the terms of the instrument itself. It is true that the passage in the plaint, upon which stress was laid on behalf of the plaintiff, suggests that the paper in question had been delivered to the servants of the plaintiff before he signified his consent to forego his claim to the 600 rupees. But neither the fact that the plaintiff accepted the defendant's offer only after the paper, which was to operate as evidence of the relinquishment, had been put into the hands of his servants, nor the circumstance that the acceptance was not in writing is at all material The moment the offer was accepted the paper which had been parted with by the first defendant conditionally, as it were, became fully operative between the parties to the arrangement and extinguished the interests which the first defendant had as a tenant. Therefore the conclusion of the Lower Courts that the relinquishment was not a mere abandonment under Section 12 of the Rent Recovery Act by the first defendant of his right to occupy the land, but a contract between him and the plaintiff which fell within Section 17 of the Registration Act, and which was, therefore, inadmissible for want of registration, appears to us be correct.

The second appeal fails and is dismissed with costs.

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**20 M. 369 = 7 M.L.J. 71.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

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KRISHNASAMI AYYANGAR (*Plaintiff*), *Appellant v.*
RANGA AYYANGAR (*Defendant*) *Respondent.**
[4th December, 1896.]

*Civil Procedure Code—Act XIV of 1882, Section 258—Adjustment of decree out of Court—Agreement not certified to Court—Action for damages.*

A decree for partition of family property was passed in favour of two plaintiffs. One of the plaintiffs having died before execution, a question arose between the [370] survivor and one of the defendants as to the devolution of his

* Appeal No. 220 of 1895.

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interest, and the decision was in favour of the surviving plaintiff. The contending parties made an arrangement according to which some of the land representing the share of the deceased plaintiff should be given to the defendant. This agreement was not certified to the Court and the decree was executed at the instance of the surviving plaintiff who subsequently refused to give effect to the arrangement. The then defendant now sued in the alternative for possession of the land awarded to him or for damages:

*Held*, (1) that the plaintiff's claim for the land was not maintainable;

(2) that the claim for damages for breach of the agreement was maintainable.

APPEAL against the decree of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, in original suit No. 56 of 1893.

The plaintiff was the brother of defendant No. 1, and it appeared that their father and defendant No. 1 brought original suit No. 22 of 1884 for partition of the family property against the present plaintiff and another coparcener, and the plaintiffs therein obtained a decree for a two-sixth share. Before the decree was executed, the father died, and a question arose as to whether the surviving plaintiff was entitled to the whole of the two-sixth share and this question was decided in his favour. The present plaintiff unsuccessfully appealed to the High Court. Afterwards, the decision of the Lower Court having been affirmed by the High Court the present plaintiff and his brother agreed to submit the matter to the arbitration of one Virasami Ayyangar, under whose award given on 23rd June 1888, the plaintiff's present claim arose. This transaction was not certified to the Court, but it was brought to its notice with a view of procuring a stay of execution. Execution however took place notwithstanding, as there was a contest as to the nature of the agreement; and the present defendant since failed to give effect to the arrangement. The Subordinate Judge dismissed the suit now brought by the plaintiff for the land awarded to him and in the alternative for damages.

The plaintiff preferred this appeal.

*Ramachandra Rau Saheb*, for appellant.

*Sankaran Nayar* and *Sankaranarayana Sastri*, for respondent.

## JUDGMENT.

In so far as the plaintiff's claim is made for lands adjudged to the defendant in original suit No. 22 of 1884, it is not sustainable in the face of that adjudication.

But as to the claim for damages for breach of the alleged agreement, the suit is not barred (*Viraraghava* v. *Subbakka* (1) **[371]** and *Mallamma* v. *Venkappa* (2). If the Subordinate Judge in his orders in execution of the decree in the previous suit had decided that there was no agreement as alleged, that decision would no doubt have operated as a bar by *res judicata* to this suit which is based upon that agreement. We find, however, that there was no such decision. The agreement was set up simply for the purpose of staying execution until the arrangements under the agreement were ripe for being certified to the Court in adjustment of the decree. The Subordinate Judge proceeded with the execution of the decree, not because he found that there was no agreement, but, on the other hand, because there were disputes as to the nature of the agreement. Neither party applied under Section 258 of the Code of Civil Procedure to have an agreement certified, and there was no order under that section. The case of *Guruvayya* v. *Vudayappa* (3) does not therefore apply.

(1) 5 M. 397. (2) 8 M. 277. (3) 18 M. 26.

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We must accordingly reverse the decree of the Lower Court and remand the suit for trial according to law in so far as the claim for damages is concerned. The suit as a suit for delivery of lands is dismissed. Costs to abide and follow the result.

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20 M. 371.

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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NITYANANDA PATNAYUDU AND OTHERS (*Plaintiffs*), *Appellants v.* SRI RADHA CHERANA DEO AND OTHERS (*Defendants*), *Respondents.**
[5th February, 1897.]

*Mortgage—Interest* 'post diem'*—Limitation.*

A mortgagee is entitled to interest *post diem*, if there is nothing in the document to indicate that the parties did not intend that interest should be paid after the due date.

APPEAL against the decree of R. H. Shipley, Acting District Judge of Ganjam, in original suit No. 40 of 1894.

Suit to recover principal and interest due on a mortgage bond, dated 16th April 1880, and executed by defendants Nos. 1 and 2 [372] in favour of plaintiffs Nos. 1 and 2, and the father deceased of plaintiff No. 3. The mortgage, omitting parties and parcels, was in the following terms:—

"On an adjusment of account made this day in respect of the registered deed executed by us and in favour of your father, late Raghunadha Patnayudu Garu, on 26th March 1875, and also the deed executed by us both in favour of Nityananda Patnayudu Garu and Brajuvasi Patnayudu Garu, among you, on 14th June 1879, the amount found due is Rs. 2,453-9-0. This day we have borrowed from you in cash Rs. 46-7-0 on account of our household expenses. For the total Rs. 2,500 (two thousand five hundred rupees) we have executed and given this deed. With interest at Re. 0-12-0 per cent. per mensem, we will pay off the principal and the interest in eight years from this date, in accordance with the terms shown herein below. The interest amount due up to the 15th of Palguna Suddham of each year, we will pay on that full moon date alone.

"That, and also, if we pay Rs. 300 or any amount less than that on that same date, this we will cause to be credited on the schedule of boundaries hereto annexed. We will not demand counter-interest for the amount we pay for the principal and interest. We will not contend that we have made any payments vouched in any other manner than by having the payment noted on the schedule of boundaries referred to above. If we fail to pay the interest amount due up to the 15th of Palguna Suddham of each year as mentioned above and commit default in respect of the instalment, then, setting aside the interest settled of Re. 0-12-0 per cent. per mensem, we will pay interest on the principal from the date of default at the rate of Rs. 1-8-0 per cent. per mensem. The amount of principal and interest, which shall be found to be due at the end of the eight years' term of this deed, will be paid fully on that fixed date alone by either of us, by means of the mortgaged property and our other property, and the payment will be caused to be entered on the

* Appeal No. 61 of 1896.

"list of boundaries annexed hereto and this deed will be taken back. As "security herefor have been mortgaged to you and put in your possession "together with their appurtenances the dry land about acres 5-0, and wet "lands acres 100·0, total acres 105-0. So until the amount of this deed "is discharged, we will not mortgage whether simply or with possession, "or sell or do any such thing to any [373] other person. We as well as "our heirs shall be responsible in this regard. Excepting to you the "mortgaged property is not already under mortgage to others for money "borrowed from them."

The following issues were among others raised in the case:—

Is plaintiffs' claim time-barred in whole or in part?

Are plaintiffs entitled to interest after the due date as damages or otherwise?

Did defendants make a valid tender to plaintiffs of any sum or sums of money under the suit bond? If so, of how much and under what circumstances?

To what relief are plaintiffs entitled?

The District Judge held that the claim for interest under the document was barred by the three years' rule. He also held that the plaintiffs were entitled apart from the law of limitation to no interest *post diem*. As to this he made *inter alia* the following observations:—

"The plaintiffs' claim *post diem* interest, *first*, as of right, and, *secondly*, "they plead that it is an indulgence which the Court should grant them. "So far as the latter point is concerned, I would refuse to allow them "any interest between the due date and the date of the plaint. They "have waited six years before suing the defendants, they refused to give "them any statement of accounts, and I think it is sufficiently clear that "they have let the debt run on as long as they dared, merely with a view "to harassing the defendants and getting good interest on their money. "I am strongly of opinion that they should have immediately, on the "expiry of the due date, given defendants notice that as the debt was not "paid, the property would be attached. It does not lie with them to "plead that they are entitled to damages for money lying idle when it is "through their own default that it has lain so long idle.

"As regards the legality of such a claim, there are two cases quoted: "—*Badi Bibi Sahibal* v. *Sami Pillai* (1) and *Gopaludu* v. *Venkataratnam* "(2). From these two rulings, I gather that unless there is a stipulation "to pay interest after due date, it cannot be claimed except as damages, "and that such stipulation may be express or implied. In the present "case I hold that there is no such stipulation. On the contrary, there is "a distinct [374] agreement that the interest and the principal are to be "repaid on a certain date by means of the mortgage, and, if necessary, "other property. That is to say, that if the money is not paid on the "due date, the mortgagees are to foreclose and recover the debt out of "the sale-proceeds of the property. I do not hold it possible to read into "this agreement any stipulation regarding *post diem* interest. The *terminus* "*ad quem* is distinctly expressed and no other construction can be put "upon the words of the bond. The plaintiff's claim that the bond "makes provision for *post diem* interest is therefore rejected, and as the "due date was in the year 1888, any claim for *post diem* interest as "damages is barred. I therefore decide the third issue against the "plaintiff.

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(1) 18 M. 257 (261). (2) 18 M. 175.

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"I distinguish between principal and interest, I find that the principal, *i.e.*, Rs. 2,500 is not barred. The time bar is 12 years and the suit "was brought within time. As to interest, it is a different matter. The "last instalment of interest fell due on the 17th April 1888, and the "question is whether the time bar is 12 years or 3 years.

"The pleader for the plaintiff argues that when the due date arrived, "and neither the balance of interest nor the principal was paid, the two "sums principal and interest were merged and became one homogeneous "debt. But from this view I dissent. I hold that, for the purpose of "considering what the time bar is, the two sums must be kept quite distinct, and this view is corroborated by the plaint itself. In the statement "of claim the last item is Rs. 1,429-11 for interest at 9 per cent. per "annum from 16th April 1888 to 24th August 1894. This is calculated "as the principal of Rs. 2,500, but, if the interest had merged in the "principal in the due date, the sum on which *post diem* interest would be "calculated would be Rs. 2,500 + Rs. 211-4 + Rs. 3,187-8.

"The limit within which a suit lies for money payable for interest upon money due is 3 years—Schedule II, Article 63, Limitation Act."

In the result the District Judge passed a decree for the principal only without the interest with the ordinary directions for sale in default of payment.

Plaintiffs preferred this appeal.

*Pattabhirama Ayyar*, for appellants.

Mr. *Subramanyam*, for respondents.

JUDGMENT.

**[375]** There is nothing in the document to indicate that the parties did not intend that interest should be paid after the expiration of the eight years, within which the principal was to be repaid, and we must, therefore, hold, having regard to the ordinary expectations of parties who enter into transactions of this kind, that it was the intention of the parties in this case that interest should continue to be paid until the liquidation of the debt. This is in accordance with the principles laid down in the recent Privy Council case *Mathura Das* v. *Raja Narindar Bahadur Pal* (1) which is now the authoritative guide on the question of *post diem* interest.

We must allow the appeal with costs in both Courts and modify the decree by allowing interest at the rate of 18 per cent. from the date of default up to 16th April 1888, and thereafter at 9 per cent. per annum up to the date of the Lower Court's decree, and further interest on the whole amount at the rate of 6 per cent. till payment. Credit should be given for the amount paid towards interest by the defendants as found by the District Judge. There will be the usual order for sale in default of payment within six months from this date.

(1) 23 I. A. 138.

20 M. 375.

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## APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.*

SANKARAN NARAYANAN (*Defendant* No. 11), *Appellant v.* ANANTHANARAYANAYYAN AND OTHERS (*Plaintiffs* AND *Defendants* NOS. 1 TO 9), *Respondents.** [23rd December, 1892.]

*Civil Procedure Code—Act XIV of* 1882, *Section* 32—*Joinder of parties—Change in character of suit.*

In an ejectment suit by a landlord against his tenant, the Court should not bring on to the record the person from whom the plaintiff holds the land, nor persons claiming to hold it from a third party, nor such third party.

[376] SECOND appeal against the decree of V.P. DeRozario, Subordinate Judge of South Malabar, in appeal suit No. 1052 of 1890, affirming the decree of V. Ramasastri, District Munsif of Palghat, in original suit No. 419 of 1888.

Plaintiff sued to recover possession of certain land with arrears of rent on the defendants removing the improvements effected by them.

The District Munsif passed a decree as prayed, which was affirmed on appeal by the Subordinate Judge.

Paragraph No. 18 of the District Munsif's judgment referred to by Wilkinson, J., was as follows :—

"In the first written statement the defendants Nos. 2 to 6 and 9 "set up their own right over the plaint property. But in the second peti- "tion put in by them, they stated holding under the eleventh defendant's "family, but without specifying on what right they held under him. Plaint- "iffs' twenty-eighth witness, who is the first defendant in the cognate suit "No. 425 of 1888, admits that, after consulting with the eleventh defend- "ant, he put in a similar petition in that suit relinquishing his own right "and setting up holding under the eleventh defendant without specifying "the nature of the right (*vide* M. P. No. 3177 of 1888). This fact shows "that at the time that petition was put in, that defendant and the "eleventh defendant had not made up their minds as to the nature of the "right which the former was to set up. Exhibits A-90 and A-91 are dec- "ree and judgment in a suit similar to the present one brought to recover "a Kudiyirup included in the Saswathom deed. Vella, the second defend- "ant, in that suit is the demisee under Exhibit 16. But he set up his "own right and made no mention whatever of holding on Janom under "the eleventh defendant. These facts are strong enough to disprove the "genuineness of Exhibits 15 and 16. Exhibit 8, the alleged Marupattam "of 1014, relates to a house different from those of these two suits. "Velu Nair, plaintiffs' seventeenth witness, the alleged demisee under "Exhibit 8, disowns the kanom and claims the property as his own jenm.

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* Second Appeal No. 1737 of 1891.

In Second Appeals Nos. 658 and 1403 of 1895 preferred against the decree of the Subordinate Judge of Calicut in appeal suit No. 417 of 1893 judgment was delivered by DAVIES and BODDAM, JJ., which was as follows :—

JUDGMENT.—These second appeals are only on questions of fact, and must, therefore, be dismissed with costs.

This case is another illustration of the objectionable practice in Malabar condemned by Mr. Justice Wilkinson in his judgment, with which we thoroughly agree in Second Appeal No. 1737 of 1891. In order that the practice may be put a stop to, that judgment will be reported.

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"The lands forming the eastern and northern [377] boundary in Exhibit "8 are described to be the eleventh defendant's jenm. But plaintiffs' "twenty-sixth witness vakil Sankunni Nair claims them as his own."

The further facts of the case appear sufficiently for the purposes of this report from the judgment of Mr. Justice Wilkinson.

*Sundara Ayyar*, for appellant.

*Pattabhirama Ayyar*, for respondents.

JUDGMENT.

WILKINSON, J.—I reserved judgment in this case not on account of any point of law which required further consideration, for upon the facts found the second appeal must fail; but because the case seemed to me at the hearing to be a typical instance of a class of cases which are too common in Malabar in which an ordinary suit between landlord and tenant valued at a few rupees, is allowed to be converted into a suit in which the title to extensive properties is determined. On further examination I find that the present is a remarkable case of that nature. The value of the suit was Rs. 20 and the stamp duty paid Rs. 1-8-0. The first plaintiff instituted the suit in 1888 to recover, with arrears of rent from 1882, a paramba leased by first plaintiff's deceased brother in February 1874 under a registered Pattam chit to the first and eighth defendants. These, *viz.*, first plaintiff and first and eighth defendants were the only necessary parties to the suit, but for some reason or other the sons and grandsons of defendants Nos. 1, 8 and were also made parties with the usual result. The lessees did not appear, but their sons and grandsons did, and they denied the letting and plaintiff's right to the paramba, and claimed the property as their own. It appears, however (*vide* paragraph 18 of Munsif's judgment), that subsequently these defendants were got at by the eleventh defendant, and at his instigation they put in a petition stating that they held under him, but carefully omitted to specify under what right they held. The first plaintiff proved the letting sued upon, and the District Munsif granted him a decree. The Appellate Court, however, remanded the suit with directions to make the jenmi under whom plaintiff held on Saswathom tenure and the jenmi set up by the lessees' sons and grandsons, parties and to try the question of title. This was done, and, after a protracted litigation, the plaintiff's title has been declared. I cannot imagine a more monstrous case. A question of title to property of very considerable value has been decided in a suit by a lessor against a lessee under a registered deed, the execution of [378] which was not denied by the lessees, and which was proved beyond all doubt by the lessor. The sons and grandsons of the lessees were improperly made parties in the first instance, and still more improperly were allowed to change their defence in the course of the suit, and to set up a person who is now shown to have no sort of right, and whose lease-deed is found to be a forgery. The suit is one of 1888. It has occupied the time and attention of three Courts and has been pending for four years. The eleventh defendant has been allowed to obtain a decision as to his title at a cost of eight annas or so, and the stamp revenue has been ruthlessly defrauded. The case ought not to have been converted from a suit of one character into a suit of an entirely different character. The sons and grandsons and their spurious landlord should have been referred to a separate suit for a decision of the question of title. It is nothing less than a scandal that cases should be tried in the manner in which this has been.

Both Courts have found that the lease sued on was granted, that the land is held under it, that second plaintiff under whom first plaintiff holds on Saswathom right is the jenmi, and that the Marupattam on which appellant relies is a recent fabrication. There are no grounds for this second appeal, which is dismissed with costs.

MUTTUSAMI AYYAR, J.—I am also of opinion that upon the facts found, the decision of the Judge is right, and that there are no grounds for interference in second appeal.

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**20 M. 378=7 M.L.J. 89.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.*

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PARAMANANDA DAS AND ANOTHER (*Counter-Petitioners*), *Appellants* v. MAHABEER DOSSJI (*Petitioner*), *Respondent.**
[2nd and 12th November, 1896.]

*Civil Procedure Code—Act XIV of* 1882, *Sections* 244, 257 *(a)—Representative of judgment-debtor—Agreement for satisfaction of judgment-debt.*

A money decree was passed against a zamindar by the High Court in 1883, and it was transferred to the District Court for execution. The decree-holder **[379]** attached and prepared to bring to sale certain villages of the judgment-debtor. These villages were included in a mortgage subsequently executed by the judgment-debtor in favour of third parties. Both before and after the mortgage the decree-holder received from the zamindar certain sums in consideration of his agreeing to postponements of the sale; also it was agreed between them at a date subsequent to the mortgage that interest should be computed at a higher rate than that provided by the decree. Subsequently the decree-holder sought to bring the land to sale, and in computing the amount then due gave credit for none of the sums so received and calculated interest at the enhanced rate. The mortgagee objected that the computation was erroneous in both these respects and the District Judge upheld his objection. The judgment-debtor took no part in the contest:

*Held*, (1) that the mortgagee was a representative of the judgment-debtor within the meaning of Civil Procedure Code, Section 244, and that an appeal lay against the order of District Judge;

(2) that the District Court not being the Court which passed the decree had no power to sanction the agreements under Section 257 (*a*), and the decision was right.

[F., 17 M.L.J. 321; R., 24 M. 689; 34 M. 450 (451)=7 Ind. Cas. 418=20 M.L.J. 961=8 M.L.T. 240; 13 C.P.L.R. 1; 21 M.L.J. 829 (831); 8 M.L.T. 374 (375).]

APPEAL against the order of E. J. Sewell, Acting District Judge of North Arcot, passed on miscellaneous petition No. 93 of 1894.

This was an application in execution of the decree of the High Court on its original side in civil suit No. 194 of 1883 which had been transferred to the District Court of North Arcot for execution.

The decree in question was a money-decree passed on 20th September 1883 against the Zamindar of Carvetnagaram and his eldest son; and in execution, the decree-holder obtained a warrant of attachment of certain villages, and a notice of sale was given. The order for sale was made on 8th September 1884. On the 2nd December of the same year the judgment-debtor mortgaged with possession the land in question to the present petitioners, and the sale in execution was repeatedly postponed by

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* Appeal against Order No. 33 of 1896.

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arrangements between the decree-holder and the judgment-debtor. Finally the sale was fixed for the 15th February 1894. On the previous day, the present petition was preferred by the mortgagee, who alleged that, in the interval, the decree had been discharged, and he prayed that the attachment be raised or that the sale should only be made subject to his rights under the mortgage. The petition was put in under Civil Procedure Code, Sections 275 and 278. The District Judge held that Section 278 was inapplicable for the reason that the petitioner had no interest in the property at the date of attachment which was in April 1884. As to Section 275 he expressed the opinion that action should be taken under it only **[380]** before the proclamation of sale was issued; but he decided that the Court should issue a fresh proclamation of sale under Section 287 and that, before doing so, it should ascertain the amount remaining due under the decree, on the information available, whether from the mortgagee or from any one else. He accordingly proceeded to make that inquiry. The amount asserted by the decree-holder to be due was arrived at by computing interest on the principal sum at the rate of 12 per cent. in accordance with an agreement made with the judgment-debtor in July 1885 instead of at the rate of 6 per cent. as provided in the decree. Moreover, credit was not given for certain sums paid by the judgment-debtor to procure the consent of the decree-holder to the various adjournments of the sale above referred to. None of these arrangements having, as it was alleged, been sanctioned by the Court, the petitioner contended that all the amounts received in accordance therewith should be credited in discharge of the claim under the decree. As to this the Judge said :—

"The Zamindar (defendant) and the plaintiff put in a joint application "on the 13th July 1885 (miscellaneous petition No. 135 of 1885), "stating that the defendant had paid Rs. 2,000 towards the amount due, "that Rs. 19,961 remained due, which defendant undertook to pay to "plaintiff before July 29th, 1885, with interest at 12 per cent. per annum "and that in default the attached property should be put up to auction "without fresh sale notice, and the petition asked that the sale should "be adjourned to July 29th. The order on the petition is not signed, "but consists of the word 'ordered' and the date July 15th, 1885. "The writing is that of Mr. H. T. Knox, who was then District Judge, "and the office order book bears the same order with his initials. I "am of opinion that this cannot be taken to be a sanction of an agree-"ment to pay interest at 12 per cent. instead of the 6 per cent. ordered in "the decree. There is not the smallest mention of the fact that the rate "agreed upon is a different rate to that in the decree, nor was there "anything whatever to attract the attention of the Judge (Mr. Knox) to the "fact so as to lead him to call for and look at the decree. There is no "request for sanction of the arrangement, nor is any section at all quoted "for the application as required by the Rules of Practice. The sole "request is for an adjournment of the sale to July 29th, the agreement "being recited as a reason for the grant of **[381]** the adjournment. It "seems to me quite clear that there was no sanction of the agreement at "all. Even if it were held that it was indirectly approved the approval "only extended up to July 29th, the agreement being only for adjournment "until then and it being expressly stated that no further time is to be given "beyond July 29th. On July 29th, another application was put in (miscel-"laneous petition 160 of 1885). This time, Section 291, Civil Procedure "Code, was quoted, the petition is distinctly for adjournment of sale and "for that only, and no further reference is made to the rate of interest to

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"be charged. But thenceforward interest at 1 per cent. is claimed in all "the execution applications. The next question is whether the District "Court of North Arcot could sanction any such agreement. It is necessary "to consider this question in connection with the sums paid from time to "time for postponement. The question of fact, in connection with them, "is not quite so clear. In some of them, the payment is not alleged to "be in consideration of postponement. Whether it ever was would be a "question of fact on which evidence might have to be taken. But "if the District Court had no power to sanction such payments "for postponement, it is not necessary to inquire whether in fact "it did so or not. Now the Court which passed the decree was "the High Court; the decree was transferred for execution to the District "Court of North Arcot. The High Court certainly did not sanction "these agreements. Petitioner contends that the District Court had no "power to sanction them. The counter-petitioner contends that the Court "had power under Section 228, Civil Procedure Code. The petitioner con-"tends that the sanction of the arrangement did, in fact, alter the decree, "and that a decree can only be altered under Section 206 or 210, Civil "Procedure Code. The contention is no doubt right and it seems "to me that to enforce under the decree, the provisions as to 12 per cent. "interest, instead of the 6 per cent. allowed under the decree, was not "executing but altering the decree. The case as to any sums agreed to be "paid for adjournment is different. To recover such sums in execution "of the decree would no doubt be to alter the decree. If that is proposed "to be done, I have no doubt that it is wrong. But the petitioner goes "further and contends that all such sums must be credited in satis-"faction of the decree. It is not contended that they were so paid by "[382] the Zamindar, but it is contended that, under the last clause of "Section 257 (*a*), they must be so applied, because paid in contravention "of the terms of the section; and they are in contravention, because the "agreement to pay them was not sanctioned by the proper Court. Every-"thing turns, therefore, upon the question whether the phrase 'Court "which passed the decree,' in Section 257 (*a*) is to be strictly interpreted "and confined to its literal meaning, or whether Section 228 may be held "to give such powers to the Court to which the decree is transferred for "execution."

In conclusion he said:—"I am of opinion that the District Court "had no authority to grant time under Section 257 (*a*). It follows, there-"fore, that any amounts paid in consideration of such postponements "must, under the second and third clauses of Section 257 (*a*), be applied "in satisfaction of the judgment-debt."

The result was that the decree-holder was found to have been over-paid, and it was ordered that no sale proclamation be issued.

The decree-holder preferred this appeal.

The Advocate-General (Hon. Mr. *Spring Branson*) *Ranga Rau* and *Ramanuja Chariar*, for appellants.

*Bhashyam Ayyangar* and *Gopalasami Ayyangar*, for respondent.

## JUDGMENT.

No doubt in *Jagat Narain* v. *Jag Rup* (1) Oldfield, J., observed that the word representative in Section 244, Civil Procedure Code, has no more extended meaning than heir, devisee or executor. But, in *Badri*

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(1) 5 A. 452.

1896 Nov. 12. — Appellate Civil. — 20 M. 378 = 7 M L.J. 89.

*Narain* v. *Jai Kishen Das* (1) Edge, C. J, and Banerji J, give strong reasons for holding that the term in question has in the context a wider signification. Accordingly when a person purchased mortgaged property from the mortgagor after a decree had been obtained against him by the mortgagee for the enforcement of the latter's right such purchaser was held by the Calcutta and Allahabad Courts to be within the meaning of Section 244 (*a*) 'representative' of the mortgagor, defendant (*Gour Sundar Lahiri* v. *Hem Chunder Choudhury* (2) and *Janki Prasad* v. *Ulfat Ali* (3).

This being so, it is difficult to distinguish on principle the case of the respondent here from the decisions just cited. For, though, in the present instance, the appellants' decree against the Raja, in **[383]** execution of which the questions in dispute have arisen, was for money only, yet as at the time the respondent obtained from the Raja the taluk on mortgage, the property had been attached on account of the appellants' decree ; the respondent who holds the mortgage which is subject to the said lien, must be held to stand in a position substantially similar to that occupied by the purchasers of the equity of redemption after the mortgage decrees in the Calcutta and Allahabad cases referred to above.

The contention, therefore, that the respondent is not a representative of the judgment-debtor, the Raja, within the meaning of Section 244 and the preliminary objection founded thereon that no appeal lies are, in our opinion, unsustainable.

The next question argued is whether the North Arcot District Court had power to sanction agreements of the kind referred to in Section 257 (*a*) of the Civil Procedure Code. Clearly it had not, inasmuch as it was not the Court which passed the decree. The words of the Section absolutely confine the power to grant the sanction to Courts which pass the decree.

The view taken by the District Judge on this point is right.

The appeal fails and is dismissed with costs.

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**20 M. 383 = 2 Weir 613.**

## APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

QUEEN-EMPRESS *v.* SESHADRI AYYANGAR.* [29th October, 1896.]

*Criminal Procedure Code—Act X of* 1882, *Section* 487—*Judicial proceedings.*

A Magistrate, who has refused to set aside an order sanctioning a prosecution on the charge of perjury, has no jurisdiction under Criminal Procedure Code, Section 487, to try the case himself.

[F., 13 Cr. L.J. 1 (2) = 13 Ind. Cas. 111.]

APPEAL under Section 417 of the code of Criminal Procedure against the judgment of acquittal passed in criminal appeal No. 9 of 1896.

**[384]** The accused was charged under Section 193, Indian Penal Code, for giving false evidence in a judicial proceeding.

The Joint Magistrate of North Arcot, having previously rejected an application preferred to him for the revocation of the sanction, given

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* Criminal Appeal No. 370 of 1896.

(1) 16 A. 483. (2) 16 C. 355. (3) 16 A. 284

under Criminal Procedure Code, Section 195, by the Magistrate before whom the offence was alleged to have been committed, tried the case and convicted the accused, who thereupon appealed to the Sessions Court. The Sessions Judge held with reference to Section 487 of the Code of Criminal Procedure and *In re Madhub Chunder Mozumdar* v. *Novodeep Chunder Pundit* (1) that the Joint Magistrate under the circumstances had no jurisdiction to try the case. He accordingly set aside the conviction and acquitted the accused.

1896 OCT. 29. — APPELLATE CRIMINAL. — 20 M 383= 2 Weir 613.

This appeal was preferred on behalf of Government.

The Acting Public Prosecutor (Mr. *N. Subramanyam*), for the Crown.

*Seshagiri Ayyar*, for accused.

## JUDGMENT.

The order of the High Court, dated 28th January 1896, on which the appellant relies, was passed mainly on the ground that there had been undue delay in making the application for transfer. Section 487, Criminal Procedure Code, was not referred to in the petition then before the High Court, nor in the order of the High Court, and was apparently not considered.

On the merits we think that it is impossible to say that an order whether original or appellate granting or refusing or revoking sanction under Section 195, Criminal Procedure Code, is not a "Judicial proceeding" as defined in Section 4 of the Act, and looking to the wide terms "brought under his notice" used in Section 487, we are of opinion that the Magistrate who declined to revoke the sanction was precluded from himself trying the case.

The Sessions Judge was, therefore, right in ordering a new trial. We dismiss this appeal.

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20 M. 385 = 1 Weir 871.

## [385] APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt, Chief Justice, and Mr. Justice Shephard.*

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QUEEN-EMPRESS *v.* SUBRAMANIA AYYAR.* [14th January, 1897.]

*Railway Act—Act IX of 1890, Section 113—Excess charge and fare recoverable as a fine—Magistrate not competent to impose imprisonment in default—Fine Imprisonment.*

Section 113, sub-Section (4), (1) of the Indian Railway Act (IX of 1890), which directs that, on failure to pay on demand excess charge and fare when due the amount shall, on application, be recovered by a Magistrate as if it were a fine, does not authorize the Magistrate to impose imprisonment in default. The excess charge and fare referred to in the section is not a fine, though it may be recovered as such.

[F., 4 Ind. Cas. 236=5 N.L.R. 151.]

CASE reported for the orders of the High Court under Section 438 of the Code of Criminal Procedure by A. E. C. Stuart, District Magistrate of South Arcot.

The case was stated as follows: "A passenger named Subramania "Ayyar was found in a third-class Railway carriage of the South Indian

* Criminal Revision Case No. 537 of 1896.

(1) 16 C 121.

1897
JAN. 14.

APPELLATE CRIMINAL.

20 M. 385 = 1 Weir 871.

"Railway train, No. 14, at the Chidambaram Railway Station on the night "of the 12th July last. The Station Master forwarded the passenger to "the Station-house Officer of the place with a letter requesting the latter "to collect the Railway fare from the passenger and send the amount to "him. The Station-house Officer sent the passenger with the letter of the "Station Master to the Stationary Sub-Magistrate of Chidambaram. The "Sub-Magistrate took up the case under Section 113 of the Railway Act "IX of 1890, and examined the passenger who represented that he had "purchased a ticket at Mayavaram for Chidambaram, and that on his "way he was robbed of his bag containing money and the ticket, and that "he knew nobody who would stand surety for him at Chidambaram where "he was a stranger. The Sub-Magistrate believed the passenger, and having "obtained his alleged address released him on his own bond for Rs. 20 "**[386]** conditional on his appearance at Chidambaram on 18th July 1896. "The passenger, however, failed to appear again. A distress warrant was "issued by the Sub-Magistrate to collect the amount due, but the warrant "was returned with an endorsement that the passenger was not to be found "in the place mentioned. The Sub-Magistrate reported the facts to the "authorities of the South Indian Railway Company, who represented to me "that the Sub-Magistrate's procedure was irregular. When the Sub-"Magistrate was called upon to explain, he seeks to justify his procedure "by saying that Sections 64 to 67 of the Indian Penal Code do not apply "to the cases contemplated by Section 113 of the Railway Act, and that he "had no power to award imprisonment in default of payment of the amount. "His view of the case is apparently supported by the rulings of the Bombay "High Court in *Queen-Empress* v. *Kutrapa*(1). That ruling appears to "have been arrived at by their Lordships with some hesitation, and as the "point is one of considerable general importance, it seems desirable that an "authoritative ruling of the Madras High Court for the guidance of the "Magistracy of this Presidency should be obtained. Should it be definitely "settled that imprisonment cannot be awarded in default of the payment "of the excess charge and fare though the law expressly enacts that this "sum shall be recovered 'as if it were a fine imposed,' the commission of "frauds upon Railway Companies, as in the present case, will be greatly "facilitated."

The Public Prosecutor (Mr. *Powell*), for the Crown.

*Rama Rau*, for the accused.

## ORDER.

We agree with the decision in the Bombay case, *Queen-Empress* v. *Kutrapa*(1). We decline to interfere.

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(1) 18 B. 440.

20 M. 387 = 2 Weir. 240.

1897
APRIL 8.

APPEL-
LATE
CRIMINAL.

20 M. 387 =
2 Weir 240.

## [387] APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.*

QUEEN-EMPRESS *v.* KANAPPA PILLAI.* [8th April, 1897.]

*Criminal Procedure Code—Act X of* 1882, *Section* 202—*Reference of cases to the* Police *for enquiry.*

A Magistrate can send a case for enquiry by the Police under Criminal Procedure Code, Section 202, only when for reasons stated by him he distrusts the truth of the complaint. In cases where the accused is a member of the Police force, it is generally better that the enquiry should be prosecuted by a Magistrate.

[F., 22 A.W.N. 1902, 195; 11 Cr. L.J. 205 = 5 Ind. Cas. 714 (717) = 4 P.W.R. 1910 Cr.]

PETITION under Sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the proceedings of A. W. B. Higgens, District Magistrate of Tinnevelly, in calendar case No. 11 of 1897.

The accused was an Inspector of Police and the District Magistrate, in the proceedings sought to be revised, sent the case for enquiry to the Superintendent of Police without himself expressing any opinion as to the truth of the complaint. This procedure was in accordance with a rule which had previously been issued by the District Magistrate for the guidance of the magistracy of the district in like cases.

The complainant preferred this petition.

Mr. *Wedderburn*, for petitioner.

### JUDGMENT.

The District Magistrate does not appear to have given any reasons for distrusting the truth of the complaint and sending the case for enquiry to the Superintendent of Police. We infer that he acted upon the view expressed in paragraph 4 of his own circular No. 557, dated 18th April 1895. We are of opinion that the rule there laid down is illegal, as Section 202 of the Code directs the Magistrate to send a case for enquiry by the Police only when he distrusts the truth of the complaint, and it requires the Magistrate to give his reasons. The terms of the fourth paragraph of the District Magistrate's circular actually override the provisions of the Criminal Procedure Code, Section 202.

[388] The orders of the Police are not binding on the magistracy.

We are further of opinion that great caution should be shown in sending, for investigation by the Police, charges against members of that force. In such cases it would generally be better that the enquiry should be prosecuted by a Magistrate.

The District Magistrate is directed to proceed with the case according to law.

Ordered accordingly.

* Criminal Revision Case No. 115 of 1897.

1897
APRIL 23.

APPELLATE CRIMINAL.

20 M. 388 = 2 Weir 251.

20 M. 388 = 2 Weir 251.

## APPELLATE CRIMINAL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

QUEEN-EMPRESS v. SINNAI GOUNDAN AND OTHERS.*
[23rd April, 1897.]

*Criminal Procedure Code—Act X of 1882, Section 203—Duty of Magistrate to examine witnesses for the complainant.*

When a case has not been disposed of under Criminal Procedure Code, Section 203, and the complainant's witnesses have been summoned, the Magistrate is bound to examine the witnesses tendered by the complainant, and is not entitled to acquit the accused on a consideration of the complainant's statement alone.

CASE reported for the orders of the High Court under Section 438 of the Code of Criminal Procedure by H. Bradley, District Magistrate of Coimbatore.

In this case the accused were charged before the Sub-Magistrate of Palladam with the offences of forcible rescue of cattle being taken to the pound, assault, and criminal intimidation. The Sub-Magistate summoned the witnesses named by the complainant, but examined the complainant alone and then acquitted the accused.

The Public Prosecutor (Mr. *Powell*), for the Crown.

*Venkatasubbayyar*, for accused.

## ORDER.

Inasmuch as the case was not disposed of under Section 203, Criminal Procedure Code but summonses were issued to the complainant's witnesses, the Magistrate was not at liberty, as he [389] assumes, to "stop the case whenever he liked." He was bound to examine the witnesses tendered by the complainant before acquitting the accused. This the Magistrate admits he did not do.

We must, therefore, set aside the acquittal and order a re-trial.

We observe that the Magistrate though he issued summonses to the complainant's witnesses, did not examine them, but acquitted the accused on a consideration of the complainant's statement alone. It is not clear why this unusual and illegal procedure was followed. Having regard to it and to the fact that the Magistrate has formed a decided opinion in the case before hearing the evidence for the prosecution, we direct that the District Magistrate do transfer the case for trial to some other Magistrate.

* Criminal Revision Case No. 16 of 1897.

20 M. 389.

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SEP. 27.

APPEL-
LATE
CIVIL.

20 M. 389.

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

PALANIANDI TEVAN AND OTHERS (*Defendants*), *Appellants v.* PUTHIRANGONDA NADAN AND OTHERS (*Plaintiffs* Nos. 2 TO 5), *Respondents.** [30th and 31st March and 27th September, 1897.]

*Easements Act—Act V of* 1882, *Section* 2 (*b*)—*Easement over a well—Customary right to use the well.*

No fixed period of enjoyment is laid down by law as necessary to establish a customary right, and a customary right to use a well may exist apart from a dominant heritage.

[R., 2 Ind. Cas. 427=20 M.L.J. 699=8 M.L.T. 399 (403)].

SECOND appeal against the decree of T. Ramasami Ayyangar, Subordinate Judge of Madura (West) in appeal suit No. 422 of 1895, reversing the decree of K. Krishnamachariar, District Munsif of Madura, in original suit No. 566 of 1894.

The plaintiffs having obtained leave under Civil Procedure Code, Section 30, sued on behalf of themselves and other members of the Shanar caste for a declaration of their right to draw water from a certain well, and for an injunction to restrain the defendants from interfering with their exercise of that right.

The defendants Nos. 1 to 3 claimed that the well belonged to them, and defendants Nos. 4 and 5 stated that they had been [390] drawing water from it with the consent of the other defendants. The District Munsif held that the well was on the land of defendants Nos. 1 to 3 and not on poramboke land as alleged by plaintiffs, and that the plaintiffs had no right to make use of it. He accordingly dismissed the suit. The Subordinate Judge reversed his decree and passed a decree in favour of the plaintiffs. He held it to be established, that people of all castes in the village including Shanars had openly and without any obstruction for upwards of thirty years made use of the well in question, and held that the plaintiffs, having in common with other residents of the village enjoyed the well, had acquired a right of customary easement.

The plaintiffs preferred this second appeal.

*Desikachariar*, for appellants.

Mr. *J. Satya Nadar* and *Sundara Ayyar*, for respondents.

## ORDER.

The case set up in the plaint is that the well was not the private property of the defendants, but was situated in poramboke land and was used by the plaintiffs, and those on whose behalf they sue, as a matter of right for the past ninety years. This would indicate that the plaintiffs claimed what is called a "customary right" such as is referred to in Section 2 (*b*) of the "Indian Easements Act, 1882," and in *Channanam Pillay* v. *Manu Puttur* (1). The Subordinate Judge found that the well belonged to the defendants, but that it had been used by the plaintiffs and those on whose behalf they sued, openly and without obstruction, for upwards of thirty years, and he, therefore, held that they had established

* Second Appeal No. 213 of 1896.

(1) 1 M.L.J. 47.

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customary *easement* over the well. The plaintiffs' claim was not put forward in the plaint as one of *easement*, and there is no allegation or issue or clear finding as to their possession of a dominant heritage entitling them to the easement.

Without a dominant heritage there can be no easement.

We fear that the Subordinate Judge has not clearly distinguished in his mind a customary right from a customary easement.

No fixed period of enjoyment is laid down by law as necessary to establish a customary right. The character and length of enjoyment which are necessary for such purpose have been, in our opinion, correctly laid down in *Kuar Sen* v. *Mamman* (1).

We must, therefore, ask the Subordinate Judge to submit findings on the evidence on record on the following issues, *viz.* :—

**[391]** (1) Whether the plaintiffs and those whom they represent have a customary right to use the water of the well as claimed in the plaint.

(2) If not, whether the plaintiffs and those whom they represent are the holders of a dominant heritage in the village and as such have a customary easement (Section 18, Easements Act) to use the water of the well as claimed in the plaint.

The Subordinate Judge is requested to submit his findings within a month from the date of the receipt of this order. Seven days will be allowed for filing memorandum of objections after the findings have been posted up in this Court.

[The Subordinate Judge made his return as follows :—

Plaintiffs' vakil gave up the first issue and confined himself to the second issue. He contends that the dominant tenement to which the customary right of easement is attached is the possession of residence by the plaintiffs and those whom they represent. I think the contention must prevail. Since it appears from the evidence of the plaintiffs' witnesses that all the residents of Kokilapuram, except Neechars or Pariahs and Pallars, have been using the water of the well, plaintiffs by possessing houses and becoming residents of Kokilapuram have acquired the right of easement to use the water of the well.

I therefore find the first issue in the negative and the second issue in the affirmative.]

This second appeal coming on for final hearing, the Court delivered the following

## JUDGMENT.

We accept the finding and dismiss the second appeal with costs.

(1) 17 A. 87.

20 M. 392.

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AUG. 25.

APPELLATE CIVIL.

20 M. 392.

## [392] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.*

RANGAYYA APPA RAU (*Plaintiff*), *Appellant* v. RATNAM AND OTHERS (*Defendants*), *Respondents in Second Appeal No.* 906.

SRIRAMULU (*Defendant*) *Respondent in Second Appeal No.* 907.
KRISHNAMMA AND OTHERS (*Defendants*), *Respondents in Second Appeal No.* 908.

PENDALA BHUPATI (*Defendant*), *Respondent in Second Appeal No.* 909.

LAKSHMIPATI (*Defendant*), *Respondent in Second Appeal No.* 910.
KOTAYYA (*Defendant*), *Respondent in Second Appeal No.* 911.
LAKSHMINARAYANA AND ANOTHER (*Defendants*), *Respondents in Second Appeal No.* 989.*

ACHAYYA AND ANOTHER (*Defendants*), *Respondents in Second Appeal No.* 990. [27th October and 6th November 1896 and 25th August, 1897.]

'Res judicata '—*Civil Procedure Code—Act XIV of* 1882, *Section* 13—*Decision of Revenue Court.*

A zamindar distrained for rent under the Rent Recovery Act of 1865. Thereupon the tenant filed a summary suit under that Act in a Revenue Court, and the distraint was annulled on the ground that the zamindar had not tendered a proper patta as required by Section 7. The zamindar now sued in the Court of the District Munsif to recover the arrears of rent:

*Held*, that the question of the propriety of the patta tendered was not *res judicata*.

[R., 21 M. 482 (F.B.); 31 M. 62=17 M.L.J. 601=3 M L.T. 186; D., 27 M. 65.]

SECOND appeals against the decrees of E. A. Elwin, Acting District Judge of Kistna, in appeal suits Nos. 2155, 2156, 2216, 2217, 2218, 2219, 2133, and 2134 of 1893, affirming the decrees of C. Rama Rau, District Munsif of Bezwada in original suits Nos. 88, 82, 84, 85, 86, 83, 87, and 89 of 1893, respectively.

The plaintiff in all these suits was the Zamindar of Nuzvid and the defendants were his tenants, and he sued them to recover [393] arrears of rent. The two questions which arose in each suit were (1) whether the plaintiff had tendered a proper patta as required by the Act; (2) whether the claim was barred by limitation. On the first point the Lower Courts held against the plaintiff on the ground that the pattas tendered had been held to be improper in the course of summary proceedings under the Rent Recovery Act. The second question was also decided against the plaintiff.

The suits were accordingly dismissed.

The plaintiff preferred these second appeals.

*Sundara Ayyar*, for appellant in all cases.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*), for appellant in second appeal No. 989 of 1895.

Mr. *Krishnan*, for respondents in all cases.

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* Second Appeals Nos. 906 to 911, 989 and 990 of 1895.

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APPELLATE CIVIL.

20 M. 392.

ORDER.

*In Second Appeal* No. 906.—The facts of the case, so far as the question raised with reference to the claim for the rent for fasli 1299 is concerned, appear to be these: Before the present suit was instituted the appellant (plaintiff) had distrained for that rent under the Rent Recovery Act VIII of 1865. Thereupon the respondents (defendants) filed a summary suit before the Collector under the provisions of that Act to set aside the distraint. The distraint was set aside on the ground, it would seem, that the appellant had not tendered a proper patta as required by Section 7 of the Act. This finding of the Collector has now been held, by the District Munsif as well as by the District Judge, to conclude the appellant from showing, in the present suit, that there was such a tender. The question is whether this decision is right.

We think it is not. *Ragava* v. *Rajagopal* (1) relied upon on behalf of the respondents, no doubt supports the view taken by the Lower Courts. But that case is in conflict with the earlier decision in *Rama* v. *Tirtasami* (2) and was dissented from in *Gangarazu* v. *Kondireddiswami* (3) by Muttusami Ayyar and Best, JJ., who followed the case of *Rama* v. *Tirtasami* (2). The same learned Judges held in *Oliver* v. *Markandayyan* (4) also, that decisions of Revenue Courts do not operate as *res judicata*, when the same question arises between the parties in a Civil Court. Moreover inasmuch as the Revenue Courts canot entertain suits for rent like the present, those tribunals are not, within the meaning of [394] Section 13 of the Code of Civil Procedure, Courts of competent jurisdiction entitled to adjudicate so as to bar the Civil Courts from trying, in such suits, a question already decided by the former tribunals. This being so, the fact that Section 13 is not exhaustive on the subject with which it deals, cannot render applicable here, the reasoning adopted by Burkitt, J., in *Har Charan Singh* v. *Har Shanker Singh* (5) which would be legitimate only if the case, is one falling outside the terms of the section. For, the present case is not one of the latter description, but is covered by the express language of the section ; the words therein "competent to try such subsequent suit" absolutely precluding the decision of the Revenue Courts from operating as *res judicata*. To hold otherwise, under these circumstances, would clearly be in direct contravention of the legislative provision and would not be an application of the general principle of *res judicata* to a case not provided for by statute.

As to the claim for the rents for faslis 1296, 1297 and 1298 held to have been barred by limitation on the authority of the decision in *Sriramulu* v. *Sobhanadri Appa Rau* (6) which overruled that of Muttusami Ayyar, J., in *Sobhanadri Appa Rau* v. *Chalamanna* (7), the appellant, we think, is entitled to prove, as he was permitted to do in *Ramakrishnamma* v. *Rangayya Appa Rau* (8), that his right was acknowledged or that the bar of limitation was in some other way removed.

We must therefore call for fresh findings on the following issues on the evidence on record as well as upon any other evidence which the parties might adduce at the enquiry :—

1. Is the plaintiff's suit for faslis previous to 1299 time-barred ?
2. Whether proper pattas were tendered in the suit faslis ?

(1) 9 M. 39. (2) 7 M. 61. (3) 17 M. 106.
(4) Second Appeals Nos. 750 to 754 of 1892 unreported.
(5) 16 A. 464. (6) 19 M. 21. (7) 17 M. 225.
(8) Civil Revision Petitions Nos. 29 to 117 and 198 to 205 of 1895 unreported.

1897 AUG. 25. — APPELLATE CIVIL. — 20 M. 392.

The findings are to be submitted within one month of the receipt of this order. Seven days will be allowed for filing objections after the findings have been posted up in this Court.

*In Second Appeal Nos.* 907 *to* 911, 989 *and* 990 *of* 1895.—For the reasons given in our judgment in second appeal No. 906 of 1895, we call for a finding on the issue whether the claim is barred by limitation.

Fresh evidence may be taken. The finding is to be submitted within one month after the receipt of this order. Seven days will [395] be allowed for filing objections after the finding has been posted up in this Court.

[In compliance with the above order, the District Judge returned his finding in the second issue which was as follows:—

I find on this issue that pattas were tendered in faslis 1299 and 1300, but that the pattas were not proper or such as the defendant was bound to accept in that they imposed improper conditions as to buildings and raised the rent without the Collector's sanction.

The District Judge reported that the second appeals with reference to which the first issue was framed, had been compromised. In the result the second appeal having been posted again for disposal, some of them were withdrawn, and the High Court delivered judgment dismissing the rest.]

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**20 M. 393 (P.C.)=24 I.A. 191=7 Sar. P.C.J. 252.**

## PRIVY COUNCIL.

PRESENT:

*Lord Macnaghten, Lord Morris, Mr. Way, Sir Henry De Villiers and Sir Henry Strong.*

[*On petition from the High Court at Madras.*]

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RAJA RAO VENKATA SURIYA MAHIPATI RAM KRISHNA RAO BAHADUR (*Plaintiff*), *Appellant v.* THE COURT OF WARDS AND ANOTHER (*Defendants*), *Respondents.* [31st July, 1897.]

*Preparation of the copy of the record—Papers to be omitted.*

In a suit in which the original Court had framed and decided several issues, the High Court on appeal confined their decision to the questions which, in their opinion, governed the case, leaving other issues undecided as not affecting the result after the decision to which they had come.

Afterwards the suit was admitted to appeal in conformity with Section 603, Code of Civil Procedure.

In the preparation of the printed copy of the record the question arose whether the copy should be made of the whole record, or of only so much of it as was material to the correctness of the High Court's decision.

Their Lordships directed that only so much of the original record as bore upon, and was material to the questions decided by the High Court, and the subject of the appeal, should be printed in the copy.

[396] PETITION for an order amending directions (30th April 1897) of the High Court as to the preparation of the copy of the record of an appeal.

The petitioner was the plaintiff in a suit which had been admitted to appeal in conformity with Section 603, Code of Civil Procedure. He asked for a direction, reversing that made on petition to the High Court, as to

1897 JULY 31. — PRIVY COUNCIL. — 20 M. 395 (P.C.) = 24 I.A. 184 = 7 Sar. P.C.J. 252.

the course to be followed in preparing the copy of the record for the hearing an appeal by the Judicial Committee. The direction asked for was that a copy of only so much of the original record should be printed for transmission to the Registrar as was material to the questions decided by the High Court in the judgment under appeal.

The petition stated that the suit to which it had reference was filed in 1891 in the District Court of Godavari for a declaration that the minor defendant was not the legitimate son of the late Raja of Pittapur; that a will, dated the 7th March 1890, whereby that Raja had bequeathed the whole of his property to the minor defendant, was invalid as against the plaintiff; and that the latter, as the adopted son of the late Raja, was entitled to succeed to the entire estate.

The Court of Wards, as defendant on behalf of the minor, admitted the adoption of the plaintiff, but asserted that the minor defendant was the legitimate son of the late Raja, and that the will, whereby this son had become entitled, was valid and effectual.

The most important of the several issues framed by the District Court questioned the validity of the will, and the legitimate birth of the minor. The District Judge, upon the issues, decided that the minor was not the son of the Raja, and that the plaintiff had been given to be adopted by the Raja on the clear understanding between the Raja and the child's natural father, that upon the adopted son the inheritance should devolve. The decision, therefore, was that the plaintiff's title prevailed; and from this judgment, in 1895, the defendants appealed to the High Court.

There was no dispute in the appellate Court that the estate was an an impartible one. That Court, having found that there was no proof that the estate was not subject to be alienated by the last owner, held that the will of 1890 was not invalid, or imperative, by reason of any settlement having been made by the Raja in the plaintiff's favour. Thus the High Court decided that the will was a valid one, and this involved the dismissal of the suit, and they **[397]** held that it was unnecessary to inquire into the matter of the legitimacy of the minor, or to hear the appeal on any further issue (*See Court of Wards* v. *Venkata Surya Mahipati Ramakrishna Row* (1)).

On the 27th January 1897, an appeal against this judgment was admitted, in conformity with Section 603, Code of Civil Procedure. On the 19th February following, the Deputy Registrar of the High Court forwarded to the pleaders, on each side in the above appeal, a list of the papers on the record for them to select which should be printed for the copy to be transmitted.

The petitioner's vakil submitted a list limited to papers which, in his opinion, were material to the question decided by the High Court. But the pleader for the defendants proposed what would have been, practically, the printing of the entire record. The reasons given by the latter were that the Judicial Committee, according to what was believed to be their practice, would go into the whole case, if they should reverse the decree of the High Court, and would not remit the suit to be heard in India. For this it would be necessary that the whole record should be before them. On the other hand, on behalf of the plaintiff, it was contended that a copy of the whole record would, at this stage, be unnecessary in

(1) 20 M. 167.

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whatever way the appeal might be disposed of. If the High Court's judgment should be affirmed there would be an end. If that judgment should be reversed, the suit would be remitted to India, each party being entitled to have the High Court's decision upon the whole of the facts.

On the 30th April 1897, the High Court ordered that the Registrar should take the usual course, and have the whole record transcribed ; and that he should decide, after consulting the parties, what paper was part of the record.

Against this order the present petition was filed.

Mr. *J. D. Mayne*, for the petitioner, submitted that to carry out the order of the High Court would cause unnecessary delay and expense. The evidence of as many as seventy-five witnesses for the plaintiff had been recorded, and of one hundred and twenty five for the defendants. One hundred and eighty-six documents had been filed for the plaintiff, and more than four hundred for the defendants. Next to nothing of the oral evidence, very few **[398]** of the documents, and probably only the deed of adoption, and the testamentary papers of the late Raja, had any bearing in the questions decided by the High Court which were of law. If the record should be limited to what was material to the only issues to which the appeal related, the appeal could be heard in a few months. If the whole record had to be transmitted, it would be some years before the appeal could be heard.

There was no appearance for the respondents.

## ORDER.

Their Lordships were of opinion that the direction asked for should be given. The order of Her Majesty in Council upon their report was that the order of the High Court be reversed, and that the Registrar of the High Court be directed to transmit only so much printed copy of the original record as properly bears upon, and may be material for, the decision of the questions of law which were decided by the High Court and form the subject of the present appeal.

Solicitors for the petitioner—Messrs. *Frank, Richardson & Sadler*.

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**20 M. 398.**

## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Davies.*

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RANGA PAI AND ANOTHER (*Plaintiffs*), *Appellants v.* BABA AND ANOTHER (*Defendants*), *Respondents.** [21st, 23rd, 24th and 30th January and 1st September, 1896 and 6th August, 1897.]

*Limitation Act—Act XV of* 1877, *Section* 10—*Suit between Co-trustees—Breach of trust—Court Fees Act—Act VII of* 1870, *Section* 5—*Objection as to Court fee paid on appeal.*

The plaintiffs and defendants together with one Subbaraya Pai who died in 1884, were trustees of a temple, having been appointed by the committee under Act XX of 1863. For some years before his death Subbaraya Pai was left in exclusive management. Subsequently the defendants were in sole management of the temple until 1891, when the plaintiffs brought the present suit charging that the defendants had excluded them from the right of management, and claiming that they should make good sums lost to the institution by reason of breaches of trust alleged to have been committed by them. Some of the breaches of trust took place before 1884. Of the others, which took place subsequently, some consisted in improper dealings with the temple property to the detriment

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* Appeal No. 156 of 1894.

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of the temple and to the advantage of certain relatives of the defendants. The [399] plaintiffs also asked for an injunction to restrain the defendants from excluding them from management:

*Held* (1) that, in the absence of evidence of an absolute denial by the defendants of the plaintiffs' right to act as trustees, the suit for an injunction was not barred by limitation:

(2) that the suit could not be regarded as a suit by the beneficiaries and was not within the operation of Limitation Act, Section 10;

(3) that the suit was not maintainable in respect of breaches of trust committed in the lifetime of the deceased manager, as being to that extent barred by limitation, and also for the reason that such breaches were not more imputable to the defendants than to the plaintiffs;

(4) that even if it had been proved that the community interested in the temple had sanctioned the acts of the defendants now complained of, that circumstance would not suffice to excuse the defendants;

(5) that the defendants were liable to make good the loss occasioned by any breach of trust committed within six years of the date when the suit was instituted even in the absence of fraud, and that in estimating such loss prospective loss should be assessed.

*Held further*. that an objection taken on behalf of respondents at the hearing of an appeal as to the amount of Court-fee stamp affixed to the petition of appeal to the High Court, cannot be entertained.

[R., 37 C. 914=8 Ind. Cas. 1145 (1146); 9 C.L.J. 383=13 C.W.N. 557; D., 21 M. 269.]

APPEAL against the decree of W. C. Holmes, District Judge of South Canara, in original suit No. 13 of 1891.

The plaint set out that the plaintiffs and defendants were trustees of the Venkatramana temple at Mangalore, that the defendants and Subbaraya Pai, a trustee who died in 1884, spent temple funds for other than temple purposes and acted injuriously to the interests of the temple, that since Subbaraya Pai's death, the defendants acted injuriously to the interests of the temple and caused loss to the temple, that the defendants acted independently of the plaintiffs in temple affairs; and it prayed for a decree (1) ordering an account to be taken of the temple management from 1876-77 to date, and ordering the defendants to make good the loss which was estimated at Rs. 2,600 and (2) prohibiting the defendants by an injunction from conducting the temple affairs except in conjunction with the plaintiffs The defendants filed a joint statement to the effect that the plaintiffs were appointed trustees of the temple in 1875, but did not enter on the duties of the office, that the plaintiffs took the side of certain out-caste Bhandaries in 1876 and were refused all interference in the temple affairs, that the temple affairs had always been managed by a single trustee chosen by the community, that till his death in 1884 Subbaraya Pai was the sole manager, that since then the second [400] defendant was the sole manager, that the plaintiff had no right to join in the management against the will of the managing moktessor, that the allegations as to the improper management of the temple were not true, that Subbaraya Pai was solely responsible for any mismanagement during his term of office, that the plaintiffs were not entitled to an account nor to join in the management of the temple, and that the suit was barred by limitation.

It appeared that the parties were appointed trustees of the temple in question by the committee under the Religious Endowments Act, 1863. Up to the date of Subbaraya Pai's death he had been in exclusive management; and it is unnecessary for the purposes of this report to state the nature of the breaches of trust alleged to have been committed in his lifetime. The breaches of trust dealt with in the fourteenth and following

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issues were alleged to have taken place subsequently, and they consisted in omissions by the defendants to collect debts due to the institution, and their remission of certain debts due to it by relatives of the defendants and leases and mortgages of the trust property in favour of the defendants' relatives and detrimental to the institution. Some of these acts had been, it was said, sanctioned by the community interested in the temple.

The District Judge decreed to the plaintiffs the injunction sought but otherwise dismissed the suit.

The plaintiffs preferred this appeal.

*Pattabhirama Ayyar* and *Madhava Rau*, for appellants.

*Ramachandra Rau Saheb* and *Narayana Rau*, for respondents.

## JUDGMENT.

In this case objection is taken by the respondents' vakil to the amount of the Court-fee stamp affixed by the appellants to their petition of appeal. In our opinion the objection taken at the hearing of the appeal cannot be entertained. The mode in which any question as to the amount of any fee payable in the High Court should be determined is prescribed in Chapter II of the Court Fees Act. The 5th Section provides that any such question arising between the officer whose duty it is to see that any fee is paid and any suitor or attorney shall be referred to the taxing officer whose decision shall be final, except in case of a reference being made by him to the Chief Justice when the decision of the Chief Justice shall be final. In the present instance there was no reference to the Chief Justice. It is suggested that the provision as to the finality of the taxing officer's decision is [401] intended to apply only as between the appellant and the officer mentioned in the section and that it does not prevent a respondent from questioning the decision. If this were the right construction of the section with reference to the taxing officer's decision, it must also hold good with regard to the decision of the Chief Justice. Neither decision can, in this view, be regarded as final except as regards the party who has filed the petition of appeal or other document. We can find nothing in the language of the section to justify this conclusion. Had it been intended to give finality of such a restricted kind to either decision, the term 'suitor' would not have been used. We must hold therefore that the taxing officer's decision cannot be questioned by the respondents' vakil. The cases to which we were referred are not really in point, for the Act makes a distinction between the High Court and other Courts and in those cases it was not in the High Court that the appeal out of which the dispute regarding the stamp arose had to be filed.

The appeal is against so much of the decree of the District Judge as dismisses the plaintiffs' suit, and objection is taken by the respondents to the remaining part of the decree which is in favour of the plaintiffs.

It will be convenient to deal first with the point of limitation raised by the respondents in answer to the whole suit. The plaintiffs' claim is of a twofold character. There is first the charge of breach of trust against the respondents and a prayer for an account, and secondly the allegation "that the defendants behave independently of the plaintiffs in respect of temple affairs" and a prayer for an injunction restraining the defendants from conducting the temple affairs without the co-operation of the plaintiffs. With regard to this latter head of claim the plaint is unfortunately vague, and no date is assigned to the alleged exclusion of the plaintiffs. In their written statement the defendants allege that the plaintiffs "have

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"been refused all interference in the temple affairs and its management" since 1876, and on this they found their plea of limitation.

We agree with the District Judge in his conclusion on this point. It is clear from the evidence that, although the plaintiffs did not take any active part in the management of the temple, there was no absolute denial by the defendants of their right to act as trustees. On the contrary they were on occasions, for [402] instance in 1884 after the death of Subbaraya Pai, when an acquittance had to be given to his widow, and in 1887 when a suit was being brought, associated as trustees with the defendants. As the present suit was brought in August 1890, there can be no doubt that the suit is not barred by the law of limitation, so far as the second head of claim is concerned, and no other ground was urged by the respondents' vakil for impeaching the decree granting relief in respect of this claim. As regards the other claim laid against the defendants, it is contended on behalf of the plaintiffs that the suit is one for which they are entitled to claim the benefit of the 10th Section of the Limitation Act and that accordingly the defendants can be made liable in respect of breaches of trust occurring at any time since they were appointed trustees. To support this contention it is necessary for the plaintiffs to make out that they are suing as representatives of the temple in order to recover for its benefit the property which belongs to it, and it was argued by the plaintiffs' vakil that that was in fact the nature of the suit. In the view we take it is unnecessary to decide somewhat doubtful question whether Section 10 of the Act applies to a suit like the present charging breaches of trust and claiming an account. (See *Saroda Pershad Chattopadhya* v. *Brojo Nath Bhuttacharjee* (1) and *Thackersey Dewraj* v. *Hurbhum Nursey*(2)). For in our opinion the suit is really brought to vindicate the rights of the plaintiffs as co-trustees with the defendants and to protect their interest, and not, except indirectly, the interests of the temple. That this is the character of the suit appears from the very prayer for an injunction already mentioned. In respect of that prayer at least the plaintiffs cannot say that they represent the beneficiaries. We do not overlook the language of the plaint on which the plaintiffs' vakil relies. The allegation that there has been loss to the temple and the prayer that the money due to the temple may be paid by the defendants are not inconsistent with a suit instituted by the plaintiffs on their own behalf, for it is to their own interest to rescue and preserve the property of the temple. The matter may be tested by asking whether the plaintiffs are entitled to charge against the temple the costs of this litigation. How could this possibly be allowed when it is seen that, but for the supineness [403] of the plaintiffs, no breach of trust would have occurred and no litigation would have been necessary? It would be obviously unjust to allow the plaintiffs to figure in one character for one purpose and in another for another purpose. It might possibly be different if the defendants were not, as well as the plaintiffs, trustees of the temple, but as against the plaintiffs their co-trustees the defendants have defences open to them which would not be available against third parties representing the temple. It has been urged in this case that a trustee is not at liberty to sue his fellow-trustee except under special circumstances. This is a defence which is open to the defendants as against the plaintiffs, but would of course not be open to them if they were called to account by strangers suing solely in the interest of the devasom. That one trustee may bring

(1) 5 C. 910. (2) 8 B. 432.

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a suit against another charging him with breach of trust is not denied. There are precedents for such a suit, but what the plaintiffs' vakil has been unable to cite is a case in which a suit such as would ordinarily be brought by a *cestui que trust* has been maintained against a trustee by a fellow trustee. We are of opinion that the present suit cannot be regarded as a suit brought by the *cestui que trust*. It is a suit arising out of differences between the four trustees which in an incidental way only can benefit the temple. Such a suit we do not think can be regarded as within the operation of Section 10. Applying then the ordinary law of limitation we have to see whether the plaintiffs' claim founded on alleged breaches of trust is barred in whole or in part.

Some of the charges relate to acts done and moneys expended before the death of Subbaraya Pai; others relate to matters occurring after that date and within six years of the time when the suit was brought. The suit is in our judgment barred so far as it relates to the former charges, for Subbaraya Pai died in July 1884 more than six years before the suit was brought. Independently of the bar of limitation the defendants have another answer to the charges relating to the management of the temple affairs in Subbaraya's lifetime. As we have already said it is not in every case of breach of trust that one trustee is enabled to sue another (see *Bahin* v. *Hughes* (1) and Section 27 of the Indian Trusts Act). When the breach of trust is equally imputable to two trustees, obviously no such suit can lie. And where there are **[404]** three trustees and the management of the business has been left exclusively to one of them, it is clear that as between the other two, who are equally innocent, though they may be equally responsible to the *cestui que trust*, there can be no suit instituted. In both of these cases the parties are *in pari delicto*. In the present case it is part of the defendants' case and it is otherwise clear from the evidence, that Subbaraya Pai was until his death in exclusive management of the affairs. Against him or his representatives it may be that a suit could have been successfully brought by the other trustees. But the defendants have not been shown to be any more responsible for his acts than the plaintiffs themselves. Both plaintiffs and defendants have apparently neglected their duty. For these reasons we think the plaintiffs must fail so far as they seek to make the defendants responsible for breaches of trust which occurred in the lifetime of Subbaraya. If it were necessary to go into the question, we should be unable to agree with the Judge that the costs of litigation carried on by Subbaraya Pai could properly be charged against the temple fund.

It remains for us to deal with the other charges which form the subject of the fourteenth and following issues. The facts for the most part are admitted. Except in certain instances specially mentioned below, there is evidence to show that the defendants are responsible for the other acts and defaults of which the plaintiffs complain. On the other hand, there is no evidence to implicate the plaintiffs. The only question therefore is whether these acts constitute breaches of trust on the part of the defendants. The District Judge has considered that it is sufficient answer for the defendants to make these charges to say that they acted with the consent of the community. He refers to this ground of defence in connection with almost all the charges laid against the defendants. In our opinion this defence cannot be allowed to prevail for two reasons. In the first place it is not proved satisfactorily that the community did sanction

(1) L.R. 31 Ch. D. 390.

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the several acts of the defendants, and secondly, if such sanction was given, it would not excuse the defendants, if otherwise they had been guilty of breach of trust. This must clearly be so, for the trustees of the temple were not appointed by the community. They were all appointed under the Act of 1863 by the committee, and to the committee they are responsible for their conduct. The fact that the community have approved the acts of the trustees may be evidence that [405] such acts were not improper—but we fail to see how in any other way their approbation or consent can qualify the character of the defendants' acts.

The first act charged against the defendants is the remission of Rs. 200 arrears of rent due by a relative of the two defendants. There is then a remission of Rs. 183-5-4 and further a remission of Rs. 539 on a document executed by one of the defendants, Raghunatha Kini. These acts of the defendants, especially when regard is had to the persons who were benefited by them, are so clearly detrimental to the interests of the temple that it would be difficult to justify them. No attempt, however, has been made to prove any special circumstances; there is the alleged approval of the community and that is considered by the District Judge sufficient justification. Apparently he was under the impression that actual fraud must be proved against the defendants to make them liable. Clearer evidence of breach of trust than is given with regard to the charges embraced in the fourteenth issue can hardly be conceived.

The charges embraced in the fifteenth issue are similar in kind and the observations just made apply to them. Here again one of the persons benefited by the remission is a relative of the defendants. These charges we must also hold to be established. The sixteenth issue relates to matters which happened in Subbaraya's time The plaintiffs must therefore fail in respect of that issue. The seventeenth issue relates to debts due to the temple and not collected by the defendants. The findings on this issue are not very clear, but we cannot say that the Judge has erred with regard to it. As to many of the debts it is not shown that the defendants are to blame for the non-collection. The eighteenth issue embraces three matters. The first is a remission of Rs. 280 in favour of a cousin of one of the defendants. No justification is offered. This charge must be allowed. The second is a matter which occurred in Subbaraya's time. This charge must be disallowed. As to the third we must confess that we do not understand the charge. Nor do the observations of the Judge upon it give us any definite information. No particulars of these alleged breaches of trust were given by the plaintiffs, and it is only from the issue that we gather the nature of them. We are referred to the answer to the interrogatories but the interrogatories [406] themselves are not before us. Failing any definite evidence we must disallow this charge.

In the result we must allow the appeal in respect of the items as to which we have found the defendants chargeable. There will be a decree for the sums named by the Judge and allowed by this judgment with interest at six per cent. from the date when the remission in each case was made. The appellants are entitled to costs in this and in the Court below proportionate to the sums which will be decreed to them. The memorandum of objections is dismissed with costs.

Before drawing up the decree we must ask the District Judge to find on evidence now on record with regard to the fifteenth issue, what is the amount lost to the temple by the breaches of trust mentioned in that issue? The finding must be submitted within six weeks from the date of the receipt

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of this order, and seven days will be allowed for filing objections after the finding has been posted up in this Court.

[The District Judge having submitted his finding in compliance with the above order objections were taken by the parties and the Court called for a further finding making, *inter alia*, the following observation "with "reference to the time as to which the loss has to be calculated, it is to be "observed that prospective loss as well as past has to be provided for, "for no second suit can be brought."

This appeal coming on for final hearing, the Court delivered the following

## JUDGMENT (FINAL).

In addition to the amount mentioned in the original judgment the plaintiffs are entitled to the sum of Rs. 64 and also to the sum of Rs. 2,770-5-6 representing the loss of interest on the sum of Rs. 10,250 at 2½ per cent. from 11th September 1886 to the 3rd July 1897. That disposes of the case.]

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**20 M. 407.**

## [407] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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VASUDEVA UPADYAYA (*Defendant No.* 2), *Appellant v.* VISVARAJA THIRTHASAMI AND ANOTHER (*Plaintiff and Defendant No.* 1), *Respondents.**
[26th July and 23rd August, 1897.]

*Letters Patent, Section* 15—*Civil Procedure Code—Act XIV of* 1882, *Section* 588.

A District Munsif having dismissed a suit on a preliminary point the District Court on appeal made an order remanding it to him to be disposed of on the merits. Against this order an appeal was preferred to the High Court, which came on for disposal before a single Judge, who delivered judgment dismissing it:

*Held*, that no appeal lay under Letters Patent, Section 15, against his judgment.

[R., 26 C. 361; 22 M. 68 (F.B.)=8 M.L.J. 231; 22 M. 131; 21 M.L.J. 1074 (1075)=10 M.L.T. 278=(1911) 2 M.W.N. 259.]

APPEAL under Letters Patent, Section 15, against an order of Mr. Justice Shephard reported as *Vasudeva Upadyaya* v. *Visvaraja Thirthasami* (1) where the facts are stated.

The effect of His Lordships's order was to dismiss an appeal against an order of the District Judge by which a suit dismissed by a District Munsif on a preliminary point was remanded to be disposed of on the merits. This appeal was preferred by defendant No. 2.

*Narayana Rau*, for appellant.

*Ramachandra Rau Saheb*, for respondents.

## JUDGMENT.

BENSON, J.—This is an appeal under Section 15 of the Letters Patent against an order of Mr. Justice Shephard, dismissing an appeal against an order of the District Judge of South Canara in appeal suit No. 279 of 1893, remanding a suit to the Court of First Instance under Section 562, Code of Civil Procedure, for disposal on the merits.

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* Letters Patent Appeal No. 79 of 1896.

(1) 19 M. 331.

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A preliminary objection is raised that no appeal lies inasmuch as the order of Mr. Justice Shephard was passed in an appeal under Section 588, Code of Civil Procedure, and the last paragraph of that section provides that "orders passed in appeals under this section shall be final." In reply it is contended that the section does not apply to a case like the present where a Judge of the High Court sitting alone makes the order, and that, by [408] virtue of Section 15 of the Letters Patent, an appeal does lie notwithstanding the provisions in Section 588. In a word, the question is whether the right of appeal given by Section 15 of the Letters Patent against an order of a single Judge is, or is not, subject to the limitations on appeals prescribed by the Code of Civil Procedure. That the right is subject to such limitations was decided in *Achaya* v. *Ratnavelu* (1) which was followed in the cases of *Rajagopal in re*(2) and in *Sankaran* v. *Raman Kutti* (3), but the correctness of those decisions was recently doubted mainly in consequence of a remark of the Privy Council in the case of *Hurrish Chunder Chowdhry* v. *Kalisunderi Debi* (4), and the question was referred by a Division Court of which I was a member for the decision of the Full Bench. The present appeal was allowed to stand over pending the decision of the Full Bench. The case was ably argued before the Full Bench, but no judgment was delivered, as the case was otherwise disposed of.

The appellant's Vakil, therefore, now desires that in the present case the same question may be referred to a Full Bench, but the arguments used before the Full Bench and the consideration which I have since been able to give the matter, have satisfied me that the decisions of this Court are right, and that there is no ground for referring the question.

Much of the discussion which has centred round the meaning of Section 15 of the Letters Patent considered by itself, and also with regard to its effect when read in conjunction with Section 588, Code of Civil Procedure, has concerned itself with the meaning of the word 'judgment' in Section 15. It is admitted on all hands that if an order made by a single Judge of this Court does not fall within the meaning of the word 'judgment' as used in Section 15 no appeal will lie under the Letters Patent from that order. This Court has, however, in the reported cases, given a very wide meaning to the word 'judgment' in that section and I will assume that the order of Mr. Justice Shephard in the present case is a 'judgment' within the meaning of Section 15.

In order to apprehend the subject clearly it is necessary to refer briefly to the statutes and Letters Patent by which the High Court was constituted, and from which it derives its powers. The [409] High Court Act, 24 and 25 Vict., Ch. 104, gave Her Majesty authority to establish a High Court at Madras, to consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty might, from time to time, think fit to appoint. Section 9 of that Act gave the High Court such original and appellate jurisdiction and authority, as Her Majesty by Letters Patent might grant and direct, subject, however and without prejudice, to the legislative powers of the Governor-General of India in Council, which powers were conferred by the Indian Councils Act 24 and 25 Vict., Ch. 67, the 22nd Section of which empowers the Governor-General to make laws and regulations for all Courts of Justice whatever in India, thus, of course, including the High Courts. Section 13 of the High Court Act enacts that

(1) 9 M. 253. (2) 9 M. 447. (3) 20 M. 152. (4) 9 C. 482.

subject to any laws or regulations which may be made by the Governor-General in Council the High Court may, by its own rules, provide for the exercise of its original or appellate jurisdiction, by one or more Judges, or by Division Courts constituted by two or more Judges.

Such rules have been framed by the High Court and it is under the rules so framed that a single Judge of the Court passed the order which has given rise to this appeal.

In pursuance of the authority given by Section 9 of the High Court Act, Her Majesty issued the amended Letters Patent of 1865, Section 36 of which deals with the powers of single Judges and Division Courts. It declares that "any function which is hereby directed to be performed by "the said High Court of Judicature at Madras in the exercise of its original "or appellate jurisdiction may be performed by any Judge or by any Division Court thereof, appointed or constituted for such purpose under "Section 13" of the said High Court Act, and the section further provides for a final decision when a Bench of two or more Judges are divided in opinion.

Section 15 enacts that "an appeal shall lie to the said High Court of "Judicature at Madras from the judgment (not being a sentence or order "passed or made in any criminal trial) of one Judge of the said High "Court, or of one Judge of any Division Court pursuant to Section 13 of "the said recited Act; and that an appeal shall also lie to the said High "Court from the judgment, not being a sentence or order as aforesaid, of "two or more Judges of the said High Court, or of such Division Court, "**[410]** whenever such Judges are equally divided in opinion, and do not "amount in number to a majority of the whole of the Judges of the said "High Court at the time being; but that the right of appeal from other "judgments of Judges of the said High Court, or of such Division Court, "shall be to us, our heirs or successors, in our or their Privy Council, as "hereinafter provided."

Section 44 declares that "all the provisions of these our Letters "Patent are subject to the legislative powers of the Governor-General "in Council exercised at meetings for the purpose of making laws and "regulations . . . . and may be in all respects amended and altered thereby."

The Code of Civil Procedure was subsequently passed by the Governor-General in Council in the due exercise of his powers in order to regulate the procedure in the Civil Courts, and it cannot be denied that any alterations thereby made in the provisions of the Letters Patent are binding upon this Court. This was expressly held in an elaborate and carefully reasoned judgment of this Court, to which I have already referred in the case of *Achaya* v. *Ratnavelu* (1), where it was ruled that the right of appeal given by Section 15 of the Letters Patent is controlled by Section 629, Code of Civil Procedure, which provides that an order of a Civil Court rejecting an application for review of judgment shall be final. That decision was followed in the case of *Rajagopal in re* (2) where it was held that Section 15 of the Letters Patent, being governed by Section 588, Code of Civil Procedure, no appeal lay from the order of a single Judge of the High Court made under Section 592, Code of Civil Procedure, rejecting an application for leave to appeal in *forma pauperis*.

These decisions, it seems to me, are clear and decisive authorities on the question before us. Eleven years have elapsed since those decisions

(1) 9 M. 253.

(2) 9 M. 447.

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were reported, but they have never, so far as I am aware, been dissented from or questioned either by this or by any other High Court in India. They have been expressly approved and followed by the High Court of Allahabad in the cases of *Banno Bibi* v. *Mehdi Husain* (1) and *Muhammad Naimullah Khan* v. *Ihsanullah Khan* (2) (Full Bench), and the main line of reasoning on which they proceed appears to me to be unassailable.

[411] It is, however, contended that the remarks of this Court in the cases reported as *R* v. *R* (3) and *Vanangamudi* v. *Ramasamy* (4) seem to support an opposite view.

I do not think that this is so. In neither of those cases was any reference made to *Achaya* v. *Ratnavelu* (5) or *Rajagopal in re* (6) ; and, in fact, both cases were decided on other grounds without any reference to the effect of the Code of Civil Procedure in cutting down the right of appeal given by Section 15 of the Letters Patent. The question was, in fact, not at all considered by this Court in those cases.

An observation of their Lordships of the Privy Council in *Hurrish Chundur Chowdhry* v. *Kalisunderi Debi*(7) is, however, strongly relied upon as definitely deciding that Section 588 has no application to appeals from a single Judge of this Court. It is as follows :—" It only remains " to observe that their Lordships do not think that Section 588 of Act X " of 1877, which has the effect of restricting certain appeals, applies to " such a case as this, where the appeal is from one of the Judges of the " High Court to the full Court."

I do not think that these words lay down a general rule that Section 588 of the Code of Civil Procedure does not apply to any cases in which an appeal is sought to be made to the full Court under Section 15 of the Letters Patent from the order of a single Judge. I am of opinion that the words refer only to the actual case then before the Privy Council. In that case one Judge of the High Court had refused to transmit to the Court of First Instance for execution a decree of the Privy Council. His refusal was made the subject of an appeal to the full Court under the Letters Patent. Though the matter was brought before the Judge by a petition filed under Section 610, Code of Civil Procedure, and the order may, therefore, be said to be an order made under that section, still it was none the less an order determining a " question arising between the par- " ties to the suit in which the decree was passed and relating to the execu- " tion thereof" (Section 244, Code of Civil Procedure).

It was, therefore, an order of the kind expressly declared by Section 2 of the Code to fall within the definition of a 'decree,' [412] and, as such, it was obviously an order against which an appeal would lie as against a decree, and independently of the provisions of Section 588, which section enumerates the only orders, other than 'decrees' from which an appeal is allowed by the Code. Section 588 of the Code manifestly had no application to such an order in execution as their Lordships were then considering, and, consequently, when such an order was made by a single Judge itwas a proper subject of appeal to the full Court.

It seems to me that this is all that their Lordships intended to say, or did in fact, say. The language used amounts to nothing more than this :—" Section 588, no doubt, has the effect of restricting appeals in the " case of orders which are not decrees, but it does not apply to such a case " as this before us which is an order in execution and,therefore, 'a decree.'

(1) 11 A. 375. (2) 14 A. 226. (3) 14 M. 88. (4) 14 M. 406.
(5) 9 M. 253. (6) 9 M. 447. (7) 9 C. 482.

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"When, therefore, such an order has been made by a single Judge an "appeal lies to the full Court." In this observation, then, of their Lordships I find nothing to support the contention that an appeal will lie under Section 15 of the Letters Patent from every order of a single Judge without any regard to the restrictions on appeal imposed by various sections of the Civil Procedure Code. The same conclusion, though on somewhat different grounds, was arrived at by the Full Bench of the Allahabad High Court in the case already referred to *Muhammad Naimullah Khan* v. *Ihsanullah Khan* (1). It is impossible to suppose that their Lordships in a mere observation of four lines, without any explanation or reasoning, laid down a rule of such far-reaching importance, and opposed to what appears to be the plain language and intention of the legislature. Section 588, Code of Civil Procedure and the whole of Chapter 43, in which that section occurs, are expressly made applicable to the High Court by Section 632 of the Code.

More than this, Section 638, Code of Civil Procedure, expressly specifies the various sections of the Code which do *not* apply to the High Court, as (1) a Court of Original Jurisdiction, and (2) a Court of Appellate Jurisdiction. Section 588 and Chapter 43 are not among the sections so excluded. Moreover, in Section 638 it is added "nothing in this Code "shall extend or apply to any Judge of the High Court in the exercise of "jurisdiction as an Insolvent Court." Thus, the framers of the Code had clearly **[413]** before them the various jurisdictions exercised by the High Court under the Letters Patent, and while excluding the Code from operation in regard to portions of that jurisdiction, it declared that it should apply in regard to other matters. It seems to me impossible to suppose that if the framers of the Code intended to preserve the right of appeal from the orders of a single Judge given by Section 15, they would have omitted all reference to that section, when dealing with the very subject of the applicability of the Code of Civil Procedure to the procedure and jurisdiction of the High Court. It is argued that, as Section 15 of the Letters Patent is not expressly stated to be repealed or modified by the Code of Civil Procedure, the right of appeal given by it must be taken to remain in force. But this is evidently not so, for Section 39 of the Letters Patent is not expressly stated to be repealed or modified by the Code of Civil Procedure; yet Section 597 of the latter Code imposes a limitation on appeals to Her Majesty in Council in respect of decrees in suits of a nature cognizable by a Court of Small Causes which limitation finds no place in Section 39 of the Letters Patent. Section 597, Code of Civil Procedure, therefore, modifies Section 39 of the Letters Patent. I think that it is no less clear that Section 588, Code of Civil Procedure, modifies, and was intended to modify, the very wide terms of Section 15 of the Letters Patent.

It is, however, argued that a distinction is to be drawn between "the High Court" and a single Judge of the High Court sitting alone. It is argued apparently that a single Judge derives his jurisdiction from, and is a creation of, the Letters Patent, and is inherently subject to the limitation imposed on his powers by Section 15 of the Letters Patent, *viz.*, that he cannot give any final judgment, but that all his judgments are subject to an appeal to "the High Court," in other words, that the Court of a single Judge is congenitally affected by this infirmity that its judgments must always be subject to appeal to "the High Court."

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(1) 14 A. 226.

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It is urged that Sections 632 and 638, Code of Civil Procedure, declare that Section 588 (and other sections) apply to "the High Court," but are not declared to apply to a single Judge of the High Court, and that consequently the finality which would attach under the Code of Civil Procedure to an order of "the High Court" does not attach to the order of a single Judge. I [414] am unable to accept the validity of this argument. As already noticed Section 13 of the High Court Act enables the High Court "to frame rules for the exercise of its original "or appellate jurisdiction by one or more Judges," and Section 36 of the Letters Patent declares that "any function which is hereby directed to be "performed by the said High Court in the exercise of its original or "appellate jurisdiction may be performed" by a single Judge under the rules framed under Section 13 of the High Court Act.

When Sections 632 and 638, Code of Civil Procedure, declare that almost the whole Code applies to "the High Court" it is not reasonable to argue that "the High Court" there means the High Court in its strict sense of the Chief Justice and all the Judges. It may be broadly stated that "the High Court" in that sense hardly ever exercises its functions. It exercises its functions ordinarily through a Bench of two Judges, and in certain cases through a single Judge. I have no doubt but that when "the High Court" in these sections is referred to it means the Courts, whether of a single Judge or of a Bench of two Judges, which are, from time to time, exercising the functions of the High Court. If this is not the sense in which "the High Court" is used in these sections, then the Code of Civil Procedure does not apply at all to the Courts of a single Judge or to a Bench of the High Court, and there is no law to regulate their procedure, though there is an elaborate law to regulate the procedure of the full Court.

This is a *reductio ad absurdum*. It may be admitted that the Letters Patent do, in a number of sections, draw a distinction between "the High Court" and a Judge of that Court exercising one or more of the functions of the Court, and it may also be admitted that, if the Letters Patent stood alone without the Code of Civil Procedure having come into existence. Section 15 of the Letters Patent would have given a right of appeal against every judgment of a single Judge, for there is no limitation of the right laid down in the section. But the Code of Civil Procedure was passed for the purpose *inter alia* of defining the cases in which an appeal should be allowed and those in which it should be forbidden.

It distinctly says that against certain orders passed under the Code no appeal shall be allowed, and it, with equal distinctness, declares that the sections in which these restrictions are imposed [415] apply to the High Courts. It leads, as already stated, to a manifest absurdity to hold that the restrictions do not apply to such orders when passed by a single Judge or by a Bench of two Judges, but only when passed by the full Court.

Section 44 of the Letters Patent expressly contemplates the Governor-General in Council passing laws which shall have the effect of amending or altering the provisions of the Letters Patent, and declares that "*all the provisions*" of the Letters Patent are subject to such laws "*and may be in all respects* amended and altered thereby."

When the Governor-General in Council enacted the Code of Civil Procedure he deliberately restricted the right of appeal in regard to certain specified orders, and distinctly declared that those restrictions applied to the High Courts. All argument, therefore, to show that general words

in a general Act like the Code of Civil Procedure ought not to be so construed as to repeal specific provisions of a special enactment, like the Letters Patent, is beside the mark ; for the Code of Civil Procedure expressly deals with the powers of the High Court, and it does so in pursuance of the express terms of the statute under which the Letters Patent were issued, and in accordance with an express reservation in the Letters Patent themselves. It only remains to notice briefly the argument based on the language of the Code itself in Sections 595, 597 and 589.

The argument founded on Sections 595 and 597 briefly stated is this :—

Section 595 gives a general right of appeal to Her Majesty in Council against final judgments, decrees and orders of the High Court subject to certain conditions ; and Section 597 enacts that, notwithstanding anything in Section 595, no appeal shall lie to Her Majesty in Council from the judgment of one Judge of a High Court, nor from the judgment of a Bench of two Judges when such Judges are divided in opinion. The reason for this restriction, it is argued, is that the right of appeal and the *forum* in such cases are provided for by Section 15 of the Letters Patent which must, therefore, be regarded as still effective and not repealed by the Code of Civil Procedure. That it is not repealed is, of course, true; and it is still effective as regards orders passed under the Code of Civil Procedure and declared by the Code to be open to appeal, as well as regards orders passed under the provisions [416] of other laws than the Code of Civil Procedure. But there is nothing in the section to lead to the supposition that it was intended to preserve the right of appeal against *all* judgments of a single Judge including orders of those classes which under the Code are expressly declared to be final. In other words, Section 597 is not intended to preserve a right of appeal, in cases declared by Section 588 not to be subject to appeal. It merely forbids an appeal to Her Majesty in those cases (admittedly many) when an appeal does lie against the order of a single Judge under Section 15 of the Letters Patent inasmuch as another *forum, viz.*, the High Court is provided for such appeals.

The argument founded on Section 589 is this: "The section provides " a *forum* for appeals against orders passed by all Courts, original and " appellate, other than orders passed by the High Court in the exercise of " its appellate jurisdiction. Evidently, then, as no *forum* is provided, " this chapter of the Code is not intended to apply at all to such orders " of the High Court." The answer to this argument is that Section 632 of the Code expressly says that this chapter does apply to the High Court, but there is no need for Section 589 to provide a *forum* for appeals against orders made by the High Court in the exercise of its appellate jurisdiction, since that is already provided for by Section 15 of the Letters Patent. I cannot find a single sentence or expression in these or in any other Sections of the Code of Civil Procedure which indicate that its provisions are to be controlled and limited by the Letters Patent. On the contrary, my conclusion is that the Code of Civil Procedure was intended to modify, and does modify, the Letters Patent in certain particulars. The Code is the general law which defines the cases in which orders passed under it are, and are not, open to appeal, and this general law is equally applicable to all Courts, including the Court of a single Judge of the High Court. When such Court of a single Judge makes an order which the Code of Civil Procedure declares to be an order open to appeal, Section 15 of the Letters Patent prescribes the *forum* to which the appeal

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is to lie and it also gives a right of appeal against all orders passed by a single Judge under other laws than the Code of Civil Procedure, but it does not keep alive any right of appeal which is expressly negatived by the Code of Civil Procedure either in Section 588 or in any other section.

**[417]** I would, therefore, dismiss this appeal with costs on the ground that under Section 588, Code of Civil Procedure, no appeal lies.

SUBRAMANIA AYYAR, J.—There can be no doubt that the order of the learned Judge, against which the present appeal has been preferred, is a 'judgment' within the meaning of Section 15 of the Letters Patent. The question to be determined now is whether Section 588 of the Code of Civil Procedure applies here and prohibits the present appeal. The cases of *Rajagopal in re* (1) and *Sankaran* v. *Raman Kutti* (2) are distinct authorities in support of the view that that section applies. But doubts having been recently entertained as to whether those cases lay down the law correctly, the point was submitted for the decision of a Full Bench. The Full Bench before which the point was argued did not however, settle it one way or the other, and as my learned colleague holds that another reference in the matter to a Full Bench is not called for, I must consider myself bound in this case by the authorities referred to.

Nevertheless I am unable to accept the suggestion that the observations of the Judicial Committee in *Hurrish Chunder Chowdhry* v. *Kalisunderi Debi* (3) to the effect that Section 588 of the Code is inapplicable where the appeal is from one Judge of the High Court to the full Court are mere *dicta*. The tenor of the observations seems clearly to indicate that they were intended to be a decision on the point, irrespective of the circumstances of the particular case in which the observations were made. For the ground of the opinion of their Lordships refers not to the nature of the order appealed against, *i.e.*, whether it fell within Section 244 or under Section 588 of the Code, but to the relative position of the Judge who passed the order and the Court to which the appeal against the order was made. No doubt the observations are brief; but the point involved is indeed a plain and simple one. Nay, the single reason, assigned in the concluding part of the observations for holding Section 588 to be inapplicable, is really the fundamental reason that can be urged in support of that view, and the reason is, as I apprehend, that the very scheme of the Code as to appeals is that they lie from one Court to another. Consequently Section 588, which must be construed with reference **[418]** to this general scheme, has no application to a case where the appeal is from one Judge of a Court to the full Court.

However, whether the opinion in question of the Judicial Committee is but a *dictum* that can be explained away or a decision that is binding upon this Court can, in the existing circumstances so far as this tribunal is concerned, be satisfactorily answered by a Full Bench ruling only. In the absence of such a ruling I should, as already stated, hold myself bound by this Court's decisions referred to.

On this ground I concur in dismissing the appeal with costs.

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(1) 9 M. 447. (2) 20 M. 152. (3) 9 C. 482.

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LATE
CIVIL.

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## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.*

RAMALINGA CHETTI (*Plaintiff*), *Appellant v.* RAGUNATHA RAU AND OTHERS (*Defendants*), *Respondents.**
[19th, 20th and 29th July, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Section* 12—*Suit for money—Application by defendant for an account of dealings with plaintiff—Defendants' right to bring a separate suit, for an account.*

In a suit for money the defendant admitted that there had been money dealings between him and plaintiff, but averred that the taking of an account would show that the plaintiff was indebted to him. The Court dismissed the plaintiff's suit, but declined to take an account against the plaintiff :

*Held*, that the defendant was not entitled to have an account taken in the suit and that Civil Procedure Code, Section 12, would not have precluded him from suing for an account during the pendency of the plaintiff's suit.

MEMORANDUM of objections filed by defendant No. 1 under Civil Procedure Code, Section 561, in appeal No. 20 of 1896, which was preferred by the plaintiff against the decree of V. Srinivasa Chariar, Subordinate Judge of Kumbakonam, in original suit No. 3 of 1894.

The plaintiff alleged that the first defendant, together with the other defendants, who were the sons of his brother (deceased), constituted an undivided Hindu family; that the plaintiff, at [419] the request of the first defendant and his brother, had advanced various sums of money to them for the upkeep of the family charities and for other family purposes, and also that they had from time to time made payments to him; that, according to plaintiff's account, there was due by the family to him on 14th of October 1892 the sum of Rs. 10,704-8-6, and he now sued to recover that sum together with interest. The last paragraph of the plaint was as follows :—

"The plaintiff submits that, though the dealings began more than "three years before suit still the suit is not barred inasmuch as the "accounts are mutual, open and current, and also because the plaintiff has "appropriated the payments by the defendants within three years before "this action towards sums advanced to them before the said three years.

"Defendant No. 1, among other pleas, stated in his written statement, "the first defendant further submits that nothing is due from him to the "plaintiff; on the other hand a large amount exceeding Rs. 5,000 is due "to the first defendant by the plaintiff, for which the first defendant will "sue the plaintiff in a separate suit."

The Subordinate Judge held that nothing was due to the plaintiff and dismissed the suit declining to take an account between the parties for the purpose of ascertaining what sum was due by the plaintiff to first defendant, who desired that this should be done and with that object applied for leave to amend his written statement.

The plaintiff preferred an appeal against the decree dismissing his suit, and the first defendant preferred a memorandum of objections under Civil Procedure Code, Section 561, with the object of having the account taken as above, that a decree for the amount found to be due might be given.

* Memorandum of Objections in Appeal No. 20 of 1896.

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Mr. *Norton*, *Rama Rau*, *Sivasami Ayyar* and *Ramanuja Rau*, for appellant.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*), *Pattabhirama Ayyar* and *Jivaji*, for respondent No. 1.

The Court having given judgment, whereby the appeal was dismissed with costs, delivered judgment on the memorandum of objections as follows :—

## JUDGMENT.

The only point argued in suoport of the memorandum of objections was that the Subordinate Judge was wrong **[420]** in refusing to direct an account to be taken with a view of ascertaining the sum due to the first defendant and give him a decree therefor. It was argued that the plaintiff's suit was in reality a suit for an account, and that the defendant in such a suit was entitled to the benefit of the account if it turned out to be in his favour; and in support of this view it was contended that the first defendant was precluded by the provisions of Section 12 of the Code of Civil Procedure from himself bringing a suit for an account against the plaintiff. The answer to these arguments is, in our opinion, clear. If it were true that the suit was a suit for an account in the proper sense of that term, then it would follow, according to the decision in *Hurrinath Rai* v. *Krishna Kumar Bakshi* (1), which decision illustrates the English practice, that the first defendant would be entitled to have an account taken with a view to obtain a decree for the sum that might be found due to him. But looking at the plaint in the present case we are clearly of opinion that the suit is not of the supposed character. There is no allegation in the plaint that the first defendant was under an obligation to account to the plaintiff; there is no allegation of a mutual account, that is, an account showing payments and receipts on the one side as well as on the other (*Phillips* v. *Phillips* (2)) ; and further there is no prayer for an account. It is true that it was competent to the first defendant to have filed a suit for an account against the plaintiff, but that circumstance cannot alter the character of the suit actually brought by the plaintiff, nor could it entitle the plaintiff to bring a suit for an account if otherwise he was not in a position to do so (*Padwick* v. *Stanley* (3)). Having regard to the nature of the plaint and to the relations of the parties, we do not think the decision in *Hurrinath Rai* v. *Krishna Kumar Bakshi* (1) has any application to the present case. These observations practically dispose of the argument derived from Section 12, Civil Procedure Code. There is nothing in the provisions of that section to prevent the first defendant from bringing a suit for an account against the plaintiff, notwithstanding the pendency of the present suit. In a suit for an account brought by him (the first defendant) no doubt the matter in issue would have been substantially the matter in issue in the present suit. But the relief claimed in a suit for an account would differ in kind from **[421]** the relief claimed in the present suit. For these reasons we think that the Subordinate Judge was right in refusing to allow an amendment of the written statement. Therefore the memorandum of objections is also dismissed with costs.

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(1) 14 C. 147. (2) 9 Hare. 473. (3) 9 Hare. 627.

20 M. 421=7 M.L.J. 324.

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APPELLATE CIVIL.

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## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Davies.*

KALIANA SUNDARAM AYYAR AND OTHERS (*Defendants Nos.* 2, 3, 4, 6, 9, 10 *and* 19), *Appellants v.* UMAMBA BAYI SAHEB AND OTHERS (*Plaintiff and Defendants Nos.* 13 *to* 18), *Respondents.** [25th August and 9th and 23rd September, 1897.]

*Religious Endowments—Fort Pagodas at Tanjore—Right of management on death of the senior widow of the late Maharajah of Tanjore.*

After the death in 1855 of the late Rajah of Tanjore without male issue, Government assumed charge of the Fort Pagodas, of which he was the hereditary trustee. Subsequently, his senior widow Her Highness Kamakshi Bayi Saheba applied that they should be handed over to her as the head of the family for the time being; and Government in 1863 made an order saying "it is desirable that the connection of Government with the pagodas should cease; they will accordingly be handed over to Her Highness Kamakshi Bayi Saheba." The pagodas and their endowments were handed over in pursuance of that order and were held by the senior widow till her death in 1892. On her death Government ordered that they should be placed under the Devastanam Committees of the circles in which they were situated. The senior surviving widow now claimed to be entitled to possession and the right of management by succession, and sued accordingly:

*Held*, that Government intended to make an absolute transfer in 1863 without any reservation of a reversionary right to make a new appointment, and that whether Her Highness Kamakshi Bayi Saheba took the trust property for a widow's estate, or as stridhanam, the plaintiff was entitled to succeed.

[R., 28 M. 197.]

APPEAL against the decree of C. Venkobachariar, Subordinate Judge of Tanjore, in original suit No. 3 of 1894.

The plaintiff sued as the senior surviving widow of His Highness Sivaji Maharajah Saheb, the last Rajah of Tanjore to recover possession of the Fort devastanams and their endowments.

[422] The seven surviving widows of the late Rajah were joined as defendants, and a question was raised whether the plaintiff was in fact the senior widow and as such the head of the family. This question was answered in the plaintiff's favour in the Subordinate Court and it was not re-agitated on the appeal. The first defendant was the Secretary of State for India. The other defendants were respectively members of the Devastanam Committees of the Tanjore and Kumbakonam Circles. These committees were respectively in possession of the devastanams and other properties to which the suit related, under Proceedings of the Government in the Political Department, dated 22nd September 1892.

The late Raja died on 27th October 1855 and the Government of Madras by an act of state took possession of his state and his private property. Subsequently under Proceedings of the Madras Government, dated 21st August 1862, the estate was handed over to his senior widow Her Highness Kamakshi Bayi Saheba. These Proceedings contained the following directions:—

"The estate will therefore be made over to the senior widow who "will have the management and control of the property; and it will be "her duty to provide in a suitable manner for the participative enjoy- "ment of the estate in question by the other widows, her co-heirs. On the

* Appeal No. 234 of 1895.

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"death of the last surviving widow, the daughter of the late Rajah or "failing her the next heirs of the late Rajah, if any, will inherit the "property."

Subsequently Her Highness Kamakshi Bayi Saheba in 1862 addressed the Government on the subject of the institutions in question in the present suit as to which her memorial, dated 24th December 1862, contained the following passages:—

"Finally your memorialist prays that the pagodas and charitable "institutions which have been founded from time to time by members of "her family may now be made over to her as the head of the family for the "time being. No objection, she submits, can arise from the circumstance "of her being a female; for the Ranee of Ramnad is the acknowledged "head of all the charities in her zamindari, and has been so judi-"cially declared by the late Court of Sudder Uddalut, nor are there "abundant other instances wanting of such trusts vesting in women. "The Government has recently avowed the policy of disconnecting "itself with the religious endowments of the Hindus. Bills for that pur-"pose, your memorialist is informed, have recently been introduced both in "[423] your Excellency's Legislative Council and in the Supreme Legisla-"tive Council at Calcutta. Indeed, your memorialist is informed on "what she believes good authority, that the Government of Madras has "long since been anxious to relinquish the charge of these endowments "(the care of which was thrust upon it by the measures following on the "Rajah's death) in favour of a member of the family. Mr. Phillips, then "Commissioner of Tanjore, is understood to have gone so far in 1858, as "to have recommended the Government to make them at once over to "Suckkaram Saheb, though the Government did not think fit to sanction "that proposal. Your memorialist will not open up the unhappy circum-"stances which would necessarily make such a measure personally repul-"sive not only to herself but to all the other members of the Rajah's "family. The steps which led to Suckkaram Saheb's marriage with the "Rajah's surviving daughter, have been more than tacitly condemned by "the Supreme authorities in England and India. It is not essential that "the charge of these endowments should be vested in a male; and she "submits that she is the fit and proper person as the senior widow of her "late husband to have the charge of the charitable endowments of the "family."

The then Government Agent at Tanjore in forwarding to the Government of Madras the memorial just referred to wrote *inter alia* as follows:—"With reference to fourth item of claim in the memorial, *viz.*, "the management of the charitable and religious institutions which were "under the charge of His Highness the late Rajah, the right of Govern-"ment, in a legal point of view to provide in whatever way they might "deem fit, for the superintendence of these institutions, has already been "placed beyond all question. The only question therefore now for con-"sideration is, whether it would be expedient or beneficial to hand "over the superintendence of them to the memorialist.

"As regards the devastanams or the religious institutions, I am of "opinion that it is highly desirable that all connection with them on the "part of Government should cease. Indeed such ought to have been the "case long ago, for Government, in their Order of 21st July 1858, No. 461 "(paragraph 11), expressly directed the then Commissioner to take measures "for the disposal of the pagodas, and also at the same time threw out a "suggestion whether they might not be made over wholly or in part to

" [424] Suckkaram Saheb, son-in-law of the late Rajah, as sole trustee. " No steps, however, appear to have been taken to give effect to their order " on account of the ill-feeling which existed amongst the several immediate " members of the Rajah's family, and the difficulty which presented itself " in fixing upon a particular individual for the trust contemplated. Now, " however, that the memorialist, Her Highness Kamakshiamba Bayi " Sahiba, has been recognized as the head of the family, and has had the " whole of the private property of the late Rajah made over to her, I " conceive the Government will be disposed to accede to her request, as " far as it relates to the management of the pagodas.

"With respect to the chattrams, I have the honour to state that I " am not prepared to support the memorialist's request. If I had any " guarantee that they would be properly managed by Her Highness " Kamakshiamba Bayi Sahiba, I should be happy to recommend that " they should be made over to her, but unfortunately such is not the " case. Her Highness is, by reason of her sex and position, positively " precluded from exercising anything like a personal control over her " affairs, and I am compelled to add that my intercourse during the last " few months with those whom she would employ, has not given me any " high opinion of their integrity, nor made me think that they would " use the chattram property in any other way than as a means for aggran- " dizing themselves. I hope that I shall not be misunderstood ; I do not " doubt the good faith of the memorialist herself, but I cannot say as much " for her agents. These chattrams are, as the Government are aware, " possessed of extensive endowments, yielding an annual income of upwards " of a lakh and a half of rupees, and as the system sanctioned by Government " in their Proceedings of the 15th December 1857, No. 1046, under which " the management of these institutions is vested in the Collector under the " provisions of Regulation VII of 1817, has been found to work admirably " for the last five years, and has given general satisfaction, I beg most " earnestly, for the sake of the District of Tanjore and of all those really " interested in these chattrams, that they may not be handed over to the " memorialist."

On these and certain other documents, the Government on 19th March 1863 made an order which, so far as it related to the present matter, was in the following terms :—

[425] "The Governor-in-Council concurs in the opinion of the " offciating Government Agent that it would not be advisable to remove " the chattrams belonging to the late Rajah from the control of the " Collector. It is desirable that the connection of Government with the " pagodas should cease, and they will accordingly be made over to Her " Highness Kamakshi Bayi Saheba."

In pursuance of this order the devastanams were handed over to Her Highness Kamakshi Bayi Saheba, and she held possession of them until her death which took place in January 1892. The present plaintiff now claimed that, from the last-mentioned date, she became entitled to their possession and management in succession to the late Ranee. After referring to the above circumstances and stating that the trusteeship had long been hereditary in the late Rajah's family the plaint continued :—

"The Government, however, by its Order, dated the 22nd September " 1892, No. 537, Political Department, informed her (the plaintiff) that " the management thereof had been directed to be transferred to the " local Temple Committees; that, on receipt of this order, the Collector

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"and Government Agent at Tanjore in October following unlawfully took "possession of the said devastanam records and office as well as its "treasury containing cash, jewels and other valuables; further arranged "with Nagaraja Punt, who had been appointed by Her Highness Kamakshi Bayi Saheba as devastanam agent under her, and who, after her "death, was *de facto* manager, to hold the management under his "orders and eventually made over all the properties to the Temple "Committee of Tanjore Circle, who in their turn, on the application of the "Committee of Kumbakonam Circle, transferred to them such of the pagodas as were lying within their circle together with their endowments "and that, in this manner, the pagodas and their endowments described in "Schedule A to the plaint as well as the properties described in Schedule C, "which are dedicated for all the plaint pagodas including those in Schedule "B, both properties being within the jurisdiction of this Court, remain in "the possession of the Temple Committee of the Tanjore Circle, represented by defendants Nos. 2 to 5, while the pagodas and their endowments "mentioned in Schedule B, lying within the jurisdiction of the Kumbakonam "Subordinate Court, have passed into the possession of the Committee "of Kumbakonam [426] Circle represented by defendants Nos. 6 to "12. Plaintiff further states that the Government had no manner of right "to so resume the said devastanams all or any of them or to transfer their "possession and management to the Temple Committee of the Tanjore or "Kumbakonam Circle; that the said committees appointed under Act "XX of 1863 have no jurisdiction under the provisions of that Act over "these devastanams; that the claim, if any, on their part to possession "and management or to exercise control over them under the provisions "of that Act, has long ago become barred by limitation; that plaintiff "gave notice of action to the Secretary of State for India in Council "on the 17th May 1893; and that she also served notices upon the Temple "Committees demanding possession of the properties in their custody and "management but without any effect."

The written statement put in on behalf of the Secretary of State was to the following effect:—" First defendant states that the plaint pagodas "and their endowments were not the private property of the Rajahs of "Tanjore; that under the treaty of the 25th October 1799 by which the "province was ceded, no provision was made for the retention by the "Rajah of any share in the management of these or any other pagodas "or their endowments; that subsequently, however, the Government by "its Order, dated 5th July 1800, allowed the Rajah to exercise authority "and superintendence over the pagodas in the Fort of Tanjore amounting in "number to 59 or so, and directed the amount of their endowments to be "paid by the Collector to the Resident on his account, and also consented "to his appointing an officer for the purpose of ascertaining the appropriation of the revenue of 43 other pagodas, without at the same time "allowing such officer to have any control or authority over the expenditure in connection therewith; that it was by virtue of this order and with "the sanction of Government, the management of the plaint temples and "their endowments vested in the Rajah and it was subject to the "conditions contained in the order itself; that again when these properties "were taken possession of by the Government on the death of His Highness Sivaji along with his other properties, by an act of state as held by "the Judicial Committee of the Privy Council, the Government appointed their own officers to manage them, as then there were no "existing means of supervision and the Religious Endowments Act, XX

"[427] of 1863 had not been passed into law and it was in fact quite competent for them to do so; that the officers so appointed had been managing the properties until about the 19th March 1863, when Her Highness Kamakshi Bayi Sahiba agreed to have them under her management; that, upon her undertaking, those properties were handed over to her, but not 'unconditionally restored' to her as stated in the plaint; that she was then managing the properties until her death, not as of right and by virtue of her being the senior Ranee entitled to succeed to the Rajah's personal properties but as a person appointed by Government to manage them; and that, after her death, the Government in the exercise of their rights of management of those properties and of appointment of trustees, managers or superintendents thereof, which rights they had all along retained in themselves, transferred them to the local Temple Committees appointed under Act XX of 1863. This defendant contends that, by ordering delivery of these properties to Her Highness Kamakshi Bayi Sahiba, the Government did not divest themselves of their right to make such further or other arrangements as they might think proper with regard to their management and superintendence; that thereby they did not recognise or admit any right thereto on the part of the former Rajahs or in Her Highness Kamakshi Bayi Sahiba or in any senior Ranee of Tanjore; that the order after all was purely an executive one and could be cancelled or varied by them at any time; that again the order transferring the properties to the Temple Committees was also perfectly legal and within the rights of the Government, who did not thereby resume them as alleged by the plaintiff; that the senior Ranee among the widows of the late Rajah and in that capacity the plaintiff has no right to their management; further, that the action of the Collector in taking possession thereof was not unlawful, but in pursuance of the orders of the Government; and that the Temple Committees after the transfer of the properties to them, acquired all the rights conferred and were bound to perform all the duties imposed upon them by Act XX of 1863 in relation to those properties. He further denies that the claim of the Temple Committees is barred by limitation as stated by the plaintiff."

In the written statement of first defendant was raised a further contention that Kamakshi Bayi Sahiba by the delivery of the [428] plaint devastanams made to her "did not become a trustee of the said pagodas "and their endowments and liable as such for maladministration, but was "merely a manager during the pleasure of Government." This contention, however, was withdrawn before the settlement of issues on first defendant's motion accordingly, and the written statement was amended and paragraph 14 which raised this contention was struck out.

The Devastanam Committee of the Kumbakonam Circle adopted the defence of the Secretary of State, as also did the Devastanam Committee of the Tanjore Circle who, however, added that the right of management of the plaint properties, even if it belonged to the family of the widows of the late Rajah, vested jointly in all the surviving Ranees, and the claim of the plaintiff to the exclusion of the other Ranees, was therefore not sustainable; that the plaintiff and other Ranees had been already found by judicial decision incompetent to manage the trusts in question and the suit was unsustainable on this ground also; and lastly, that the assumption by the Government of the possession of the plaint properties and the transfer thereof to the Devastanam Committees, even if not legal for the reasons set out in the first defendant's written statement,

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constituted an act of state into the validity, of which the Court had no jurisdiction to inquire.

Various other pleas were raised by certain of the defendants, including that already alluded to, as to the plaintiff's status as senior widow, and another to the effect that if the right of management vested in the plaintiff at all, it vested in her jointly with her co-widows. These pleas, however, were overruled in the Lower Court and subsequently abandoned.

The Subordinate Judge held that the late Maharajah was the hereditary trustee of the temples in question; the Government restored them unconditionally to Her Highness Kamakshi Bayi thereby divesting itself of all rights in them; that by such restoration Her Highness Kamakshi Bayi acquired a heritable interest which passed on her death to the plaintiff as the senior surviving widow, and accordingly that Government acted illegally in taking possession on her death. He consequently passed a decree for the plaintiff.

The members of the Devastanam Committees of the Tanjore and Kumbakonam Circles preferred this appeal.

*Pattabhirama Ayyar*, for appellants.

[429] The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*) and *Jivaji*, for respondent No. 1.

*K. N. Aiya*, for respondents Nos. 2 and 6.

## JUDGMENT.

SHEPHARD, J.—The appellants are the members of the two Devastanam Committees of Tanjore and Kumbakonam. The first respondent is the senior Ranee of the late Maharajah of Tanjore.

The suit relates to certain devastanams known as the Fort or Palace Devastanams and their endowments, of which the first respondent claims to be hereditary trustee in succession to her co-widow Her Highness Kamakshi Bayi who died in 1892. Numerous questions appear to have been raised at the trial in the Court below, but in this Court the appellants' vakil did not argue the questions involved in the last seven issues and confined himself to the contentions hereinafter mentioned.

Whatever estate or interest the late Kamakshi Bayi did acquire, was undoubtedly acquired by her, under the Order of Government, dated 19th March 1863, which concludes with the words:—"It is desirable "that the connection of Government with the pagodas should cease, and "they will accordingly be made over to Her Highness Kamakshi Bayi "Sahiba." Some attempt was made to show that the late Maharajah who died in 1855 and whose property was thereupon seized by the Government in the exercise of its sovereign power (see *The Secretary of State in Council of India* v. *Kamachee Bayi Sahaba* (1)) was not the trustee of these pagodas, but possessed over them nothing more than the *Melkoima* or sovereign right of superintendence. This point is, in my opinion, sufficiently dealt with by the Subordinate Judge in the 17th and following paragraphs of his judgment. There is a clear distinction made in the documents exhibited between the public and the Fort temples. The latter are spoken of by Commissioner Phillips, in his letter of the 13th June 1857, as "possessions of the Raj, which must unavoidably "remain under management by Government officers until the final settle-"ment of Tanjore affairs." I think the Subordinate Judge is clearly right in holding that the late Raja was trustee of these pagodas.

(1) 7 M.I.A. 476.

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That being so, the only question is what was the intention of Government in passing the order abovementioned of the 19th March 1863. It is necessary to consider the circumstances which **[430]** led up to that order. On Mr. Phillips' letter abovementioned, the Government obtained the opinion of the Advocate-General as to the course which they could legally adopt with regard to the pagodas and their revenues, and on 21st July 1858, an order is passed which concludes with the following words: "—Under these circumstances, the Governor in Council requests that "the Commissioner will proceed at once to take measures for the disposal "of the pagodas on the principles above indicated and for making them "over to trustees, reporting the arrangements which he would propose for "the sanction of Government before their being carried out. It has occurred to Government that these devastanams might be made over wholly or "in part to Suckkaram Saheb, son-in-law of the late Rajah, as sole trustee, "but on this point they would desire to have Mr. Phillips' opinion."

On the 21st August 1862 an order was made by Government to the effect that the private property of the late Rajah should be handed over to the senior Ranee, the late Kamakshi Bayi, on the terms mentioned therein (see *Jijoyiamba Bai Saiba* v. *Kamakshi Bayi Saiba* (1). The nature of these terms was such that the senior Ranee and the other Ranees and the Rajah's daughter were practically placed as between themselves in the position, in which they would have been under Hindu Law, had no confiscation of the property taken place. On the 13th January 1863 the Government Agent sends up to Government a memorial from the senior Ranee with his report upon it. In the memorial occurs this passage:— "Finally, your memorialist prays that the pagodas and charitable institutions, which have been founded from time to time by members of her "family may now be made over to her as the head of the family for the "time being. No objection, she submits, can arise from the circumstance "of her being a female; for the Ranee of Ramnad is the acknowledged "head of all the charities in her zamindari, and has been so judicially "declared by the late Court of Saddr Addalut." The memorial ends with "the submission that the memorialist is "the fit and proper person as "the senior widow of her late husband to have the charge of the charitable endowments of the family."

In his report the Government Agent distinguishes between the pagodas and the chattrams. With regard to the former, he writes: **[431]** "Now "however, that the memorialist Her Highness Kamakshi Bayi Sahiba, "has been recognized as the head of the family, and has had the whole of "the private property of the late Rajah made over to her, I conceive the "Government will be disposed to accede to her request as far as it relates "to the management of the pagodas." It is on these materials that the Order of the 19th March 1863 was passed in the following language:—"It "is desirable that the connection of Government with the pagodas should "cease, and they will accordingly be made over to Her Highness Kamakshi "Bayi Sahiba."

The extreme contention on the part of the appellants in the Court below seems to have been that the intention of Government was to constitute the senior Ranee, a mere manager removable at pleasure and not to vest any estate in her. That contention was not pressed upon us at the hearing of the appeal; but it was argued that if the senior Ranee took any estate, it was only an estate for life and our attention was called by way of

(1) 3 M. H. C. R. 424 (428).

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contrast to the terms of the disposition of the Rajah's private property expressed in the Order of the 21st August 1862.

Whatever may have been the intention of Government as to the devolution of the estate on the death of Kamakshi Bayi Sahiba, I think it clear that they intended to make an absolute transfer without any reservation of a reversionary right to make a new appointment. The evidence shows that at the time the Government was anxious to divest itself and its officers of the charge of religious endowments. Only nine days before the order of Government was passed the Act XX of 1863 received the sanction of the Governor-General. By that Act a distinction was drawn between those temples whose trustees had been appointed by Government and those which had been managed by hereditary trustees. It being competent to the Government to deal with the Fort pagodas in such manner as they thought fit, they treated the pagodas as if they belonged to the latter class dealing with them in accordance with the provisions of Section 4 of the Act. There is nothing to show that the resolution so to treat them was intended to be in any way conditional, or that it was intended to leave it an open question whether at some future time the pagodas might be dealt with in some other way.

The question still remains what was the precise nature of the estate intended to be taken by the senior Ranee. It must be taken **[432]** that the estate was in the nature of self-acquired property in the Ranee's hands, in this sense, that her rights were derivative from Government and had no relation back to inheritance on the death of the Rajah. That was the view taken with regard to the private property restored by the Order of 21st August 1862 (see *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba*(1). In the order relating to the pagodas there are no express terms, such as there were in the earlier order, regulating the enjoyment and devolution of the estate. The intention of Government may, however, I think, be gathered from the terms of the memorial and the report on which the order proceeded. In the memorial the senior Ranee prays that the pagodas may be handed over to her "as the head of the family for the time being." The Government agent supports her claim on the same grounds, saying that, as she has been recognized as the head of the family and has had the private property made over to her, he conceives the Government will be disposed to accede to her request regarding the pagodas. The Government does accede to her request, so recommended by the Agent, and I think it may be fairly inferred that the intention was that she should assume the management of the pagodas in the capacity in which she asked for it, that is to say, as the head of the family for the time being. It cannot be suggested that it was in any other capacity than that of widow of the late Rajah that she was chosen as the person to whom the trust should be made over. And it must be presumed that the Government in making the grant had in view the personal law of the family to which the grantee belonged and intended to create an estate consonant to that law (see *Mahomed Shumsool* v. *Shewukram* (2), *Kunhacha Umma* v. *Kutti Mammi Hajee*(3)). This being so, the inference is, I think, irresistible that the intention was to grant a widow's estate, that is, to put Kamakshi Bayi in the position which she would have enjoyed had there been no confiscation on the death of her husband the Rajah.

The Advocate-General put the case in two ways. He argued that it was the intention of Government either to confer on Kamakshi Bayi, a

(1) 3 M.H.C.R. 424 (428.) (2) 2 I. A. 7. (3) 16 M. 201.

widow's estate or to grant the trust property to her as stridanam. In either view he contended the plaintiff would, on the death of Kamakshi Bayi, without issue, be the [433] person entitled to succeed. A consideration of the circumstances under which the grant was made, in my opinion, strongly indicates the intention of Government to adopt the former course, and that view of the grant is further supported by the presumption which exists in favour of the supposition that the estate when re-granted to a member of the original family was intended to possess the qualities which it possessed in the hands of the former holder. For these reasons, I think the Subordinate Judge has come to a right conclusion and I would dismiss the appeal with costs to be paid by the appellants to the first respondent.

DAVIES, J.—I concur throughout.

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**20 M. 433=1 Weir 233.**

## APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

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QUEEN-EMPRESS *v.* VIRAPPA CHETTI.*
[10th and 17th December, 1896.]

*Penal Code—Act* XLV *of* 1860, *Sections* 268, 283—*Encroachment on public highway—Public nuisance.*

Whoever appropriates any part of a street by building over it infringes the right of the public *quoad* the part built over, and thereby commits an offence punishable under Penal Code, Section 290, if not one punishable under Section 283.

[D., 10 A.L.J. 362=13 Cr. L. J 330=17 Ind. Cas. 574.]

APPEAL on behalf of Government under Section 417 of the Code of Criminal Procedure against the judgment of acquittal pronounced by the Second-class Magistrate of Nannilam in calendar case No. 225 of 1896.

The accused was charged with the offence of causing obstruction in a public way punishable under Section 283, Indian Penal Code. The accused was the owner of a house in a street in the Nannilam Union. The charge was that, early in 1895, he widened the pials in front of his house by about three feet and thereby encroached upon the street. A notice was served on him under Section 98 of the Local Boards Act, directing him to remove the encroachments. [434] The encroachments not having been removed, he was charged as above under the orders of the Taluk Board. The Magistrate said in his judgment:—"The Union "karnam says that the pials as widened are within the line of the adjoin-"ing houses east and west, and it is clear from his statement and from "my personal inspection that the encroachments in question cause no "danger, obstruction, or annoyance to the public."

On this ground he acquitted the accused and the present appeal was preferred on behalf of Government against the acquittal.

The Public Prosecutor (Mr. *Powell*), for the Crown.

*Tiagaraja Ayyar*, for the accused.

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* Criminal Appeal No. 422 of 1896.

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'20 M. 433 = 1 Weir 233.

## JUDGMENT.

The Second-class Magistrate has acquitted the accused in these two cases of an offence under Section 283, Indian Penal Code, on the ground that the encroachment, if such there be, does not cause any 'danger, obstruction or annoyance' to the public.

It may be that Section 283 is inapplicable in the absence of evidence that danger, obstruction or injury was caused to any particular person, but the acts of the accused clearly fell within the definition of a 'public nuisance, in Section 268, Indian Penal Code, and was, therefore, punishable under Section 290.

The public is entitled to the use of the full width of the public street, however wide it may be. Whoever appropriates any part of the street by building over it infringes the right of the public *quoad* the part built over. The act must necessarily cause obstruction to persons who may have occasion to use their public right over the part encroached upon.

The Second-class Magistrate has not decided whether the land built over was in fact part of the public street or was their own private land as pleaded by the accused. We, therefore, set aside the acquittals in both cases, and direct that the accused be re-tried and charges against them be disposed of according to law.

Ordered accordingly.

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**20 M. 435 = 7 M.L.J. 293.**

## [435] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

UTHUNGANAKATH AVUTHALA (*Plaintiff*), *Appellant v.*
THAZHATHARAYIL KUNHALI AND OTHERS
(*Defendants Nos.* 4 *and* 7 *to* 10), *Respondents.**
[10th August, and 7th September, 1897.]

*Malabar Compensation for Tenant's Improvements Act—Act I of* 1887 (*Madras*), *Sections* 6 (*c*), 7—*Tenant's agreement in* 1890 *not to claim compensation for improvements already made—Reduction of rent—Claim to make deduction from the value of improvements on account of reduction of rent.*

In an ejectment suit relating to agricultural property in Malabar, it appeared that the tenant was in possession under an agreement executed in 1890, in which it was recited that the tenant's father had been let into possession thirty years previously at a certain rate of rent and had made improvements on the land, and the defendant agreed to hold at a lower rate of rent, and not to demand compensation for the previous improvements. The plaintiff relied on the last mentioned provisions of the agreement which admittedly related to improvement made since January 1886.

*Held*, that the provisions relied on by the plaintiff were invalid under Malabar Compensation for Tenants' Improvements Act 1887, Section 12.

*Held* also PER SUBRAMANIA AYYAR, J., (DAVIES, J., *diss.*), that there was no reduction of rent or other advantage given by the landlord to the tenant within the meaning of Section 6 (*c*) and accordingly that the plaintiff was entitled to evict only on payment of the value of improvements free from any deduction.

SECOND appeal against the decree of E. K. Krishnan, Subordinate Judge of South Malabar at Palghat, in appeal suit No. 816 of 1895, affirming the decree of T. V. Anantan Nayar, District Munsif of Kutnad, in original suit No. 18 of 1895.

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* Second Appeal No. 1445 of 1896.

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The plaintiff sued to recover a paramba in Malabar which he had purchased from defendant No. 6. The father of defendant No. 6 had leased the land in question to defendant No. 1, who had executed on 15th September 1890 an instrument described as a pattam chit which was filed in the suit as Exhibit A.

That document so far as is material for the purposes of this report was in the following terms :—

"My father, the deceased Thama, had, in the year 1034, obtained "delivery and possession from you of the item of [436] property belon- "ging to you mentioned in the subjoined schedule in order to effect "Kuzhikkur and Chamayam improvements in it, and executed to you a "rent-chit agreeing to pay you annually a rent of 16 paras of paddy "measured according to the standard 30 Nazhipara, and 4 annas 7 pies "for plantain bunch. In accordance with this rent-chit the said Thama "effected Kuzhikkur and Chamayam improvements in the property and "was holding it till his death, after which my elder brother Kunjan, "who died recently, and myself have been holding it. Now as I have "again obtained delivery and possession from you of the said property on "the right of former holding, with all the right of making Kuzhikkur and "Chamayam improvements in it, having settled with you all the accounts "of rent up to the year 1066 inclusive, and having paid to you an earnest "rent-money of Rs. 14-4-7 free of interest, I hereby agree to hold "the said property and to pay you the annual rent proposed to be paid to "you of 10 paras of paddy measured according to 30 Nazhipara and valued "at Rs. 5, and of 4 annas 7 pies for plaintain bunch, the paddy to be "paid within the 5th of Kanni 1067 (19th September 1891), and plantain "bunch on the occasion of the ensuing Onam, and to obtain from you "receipt for the same. After the expiry of 1 year I agree to settle the "account of rent with you, to receive back from you the earnest rent- "money, to have the arrears of rent, if any, deducted from the earnest "rent, to receive from you the value of Kuzhikkur and Chamayam impro- "vements, to surrender possession to you of the property, and to receive "back this rent-chit from you. As from the amount due in accordance "with the rent-chit executed by Thama, a remission of 6 paras of paddy "has been granted to me also as a consideration for reclamation, I hereby "agree not to demand any value on that score, nor need any value be "given to me therefor."

The District Munsif expressed the view that the covenant in the document above recited to the effect that the tenant should not claim any compensation for improvements made by way of reclamation, was repugnant to the principles of the Malabar Compensation for Tenants' Improvements Act, 1887, and could not be upheld as a valid covenant. He accordingly appointed a Commissioner to value the improvements on the land and passed a decree for possession, on payment by the plaintiff of the amount of the value of the improvements together with the costs [437] of the commission. This decree was upheld on appeal by the Subordinate Judge.

The plaintiff preferred this appeal.

Mr. *C. Krishnan*, for appellant.

*Sundara Ayyar*, for respondents.

## JUDGMENT.

SUBRAMANIA AYYAR, J.—Though the amount involved in this case is small, the questions raised are not unimportant.

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The facts of the case are briefly as follows :—

The land, for the possession of which the plaintiff (appellant) sued in this case, had, many years ago, been originally demised by the assignor of the plaintiff to the first defendant's father. After the father's death the first defendant succeeded to the possession of the land ; but in 1890 he executed to the landlord Exhibit A. By that instrument it was provided that the first defendant was to hold the land for one year and to surrender it at the end of the term. The instrument further stated that the landlord having agreed to allow the first defendant to hold the land for the year at a rent which was less (by six *paras* of paddy worth about Rs. 3) than what was payable under the instrument of demise executed when the land was originally let to the first defendant's father, the defendant agreed not to claim compensation for certain improvements made by way of reclamation after Madras Act I of 1887 came into force. The value of those improvements amounting to Rs. 60-14-0 was directed by the Lower Courts to be paid by the plaintiff, notwithstanding the provision in Exhibit A respecting such compensation.

The first question for decision is whether the last-mentioned provision in Exhibit A is invalid under Section 7 of the enactment referred to. That section runs as follows :—" Nothing in any contract between a " landlord and a tenant made after the 1st day of January 1886 shall take " away or limit the right of a tenant to make improvements and claim " compensation for them in accordance with the provisions of this Act."

The argument on behalf of the appellant in support of the contention that the Lower Courts were wrong in awarding the compensation in question was this. The words " to make improvements and to claim compensation for them" refer only to improvements to be made in the future and to compensation which might become due in respect thereof. A contract, however, relating to compensation for improvements already effected does not fall within the section and the clause in question in Exhibit A, which refers to [438] such past improvements, is therefore valid. This contention is, no doubt, plausible, but, in my opinion, it is not sound.

The necessity for the Legislature taking the extreme step of depriving Malabar tenants of their power to enter into contracts with their landlords in regard to improvements arose from well-known local causes. A great deal of the land in Malabar, cultivated or waste, belongs to comparatively a very few *jenmis*. The rest of the people who are mostly agriculturists have, to earn their livelihood, to obtain what land they want from these *jenmis*. So long as there was not much demand for land the condition of tenants was not very bad. But with the keen competition for the possession of land which has been for a considerable time prevailing, the state of things altered. Evictions attended with serious crimes became not unusual ; the compensation awardable for improvements made by tenants being generally far below the real value of the improvements. Such a state of things required to be checked and the condition of tenants called for amelioration. Act I of 1887 was the first instalment of legislation intended to bring about a salutary change. In these circumstances it is difficult to believe that the Legislature meant to prohibit only contracts relating to improvements to be effected after such contracts. No doubt, the majority of tenants in Malabar, who are ignorant men, may perhaps not be quite as able to realize the value of the right to compensation for improvements to be made as they would be to realize the value of the right to compensation for improvements already made. Very likely also the desire of tenants to secure land for cultivation may, at the time of the

creation of tenancies, induce them too readily to disclaim compensation for future improvements. But, on the other hand, it must not be forgotten that the desire to retain land once taken and improved is with these tenants not unnaturally far stronger than even the desire to obtain land for the first time. Consequently, the probability of tenants being improperly induced to enter into improvident contracts with reference to compensation for improvements already made is certainly not less strong than the likelihood of their entering into such contracts with reference to future improvements. Looking, therefore, to the reason of the section in question, there can be little doubt that the Legislature intended to prohibit contracts relating not only to future but to past improvements also. This view is confirmed by the provisions of Section 4 of the Act. The effect of the section is that a tenant [439] shall not, at the time of the eviction, be prejudiced by any custom, which will deprive him of his right to compensation for whatever improvements made during the tenancy, whether by himself or by his predecessors-in-interest. While thus the Legislature, true to its object, has excluded the operation of custom with regard to improvements made since the creation of the tenancy till the time of the eviction, would it be reasonable to hold that a tenant may, by a contract, prejudice himself in the matter of the improvements made in the course of the tenancy but prior to the contract? To so limit the scope of Section 7 would be anomalous and would defeat the clear object of the Legislature. The provision in Exhibit A on which the plaintiff relies must therefore be held to be invalid, and in no way to affect the right to compensation for the improvements in dispute.

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The second question for decision is whether in determining the amount of compensation to be awarded, the circumstance that the rent payable under Exhibit A was less than that payable under the prior instrument of demise, should be taken into consideration as falling under Clause (*c*) of Section 6 of the Act.

As to this, the contention on behalf of the plaintiff was twofold. One was that the first part of the clause applied to the case and that within the meaning of that part there was, according to the facts here, "a reduction of rent" given by the landlord to the tenant, for which due allowance should be made in favour of the landlord. In order to see what force there is in this contention, it is necessary to bear in mind the precise position in which the parties to Exhibit A stood with reference to each other when the document was executed. Now before its execution, the tenancy, that commenced in the first defendant's father's lifetime and was continued by the first defendant, seems to have been one from year to year. But in 1890 that tenancy was determined by the mutual consent of the landlord and the tenant and the accounts relating to the rent payable in respect of that tenancy were settled and the balance due was paid up. Then came into existence Exhibit A whose terms, even if they had been the same as those of the prior demise, would clearly mark the creation of a fresh tenancy. Not the less so certainly when the terms, as has already been seen, are different; since the tenancy under Exhibit A was for a year certain, although the tenant, as a matter of fact, held over. Can it be said under these circumstances that there was a "reduction of [440] "rent"? Now these words imply a lessening of a liability created by the contract under which the property improved was demised. No doubt in letting the land again at the smaller amount, which was reserved as rent in Exhibit A, the landlord showed a favour to the tenant. But the favour was one which did not relieve the tenant to any extent from

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the payment of anything due under the demise with reference to which the improvements were made. It follows that the facts relied on did not amount to a "reduction of rent" as contended for the plaintiff.

The second contention was that though there might not have been "reduction of rent," yet there was an "advantage" given by the landlord to the tenant within the meaning of the latter part of the clause. Now the word "advantage" in that part is qualified by the term "other" and, in a context such as that under consideration, on the principle of *ejusdem generis*, "other" means "other such like." But from what has just been said with reference to the reduction of rent it will be seen that the advantage given to the first defendant in allowing him to hold under Exhibit A at the smaller amount of rent mentioned therein, was one which did not relieve the defendant partially or wholly from any subsisting liability. Such advantage cannot therefore be held to be similar to a "reduction or remission of rent," the particular kinds of advantage the enumeration of which precedes the general words "other advantage" in the clause and which, of course, as already stated, imply a discharge partial or complete from an existing obligation. The latter part of the clause also is therefore inapplicable.

Lastly, as to the costs awarded to the respondents on account of the fee paid to the Commissioner, who was deputed to ascertain the value of the improvements, I do not think that there is sufficient ground for interfering with the discretion exercised by the Lower Courts. (See *Narayana* v. *Narayana* (1)).

I would therefore, dismiss the second appeal with costs.

DAVIES, J.—The first question raised by the plaintiff (appellant) is whether the first defendant was bound by his agreement in A not to demand compensation for his improvements. With reference to Section 7 of the Malabar Compensation for Tenants' Improvements Act, 1887, it was argued that that section applies to improvements **[441]** to be made after the date of the contract; but I think it is clearly intended to refer to any improvements made after the first day of January 1886 whether the contract be made prior to or subsequent to the making of such improvements. The contract in this case was made in 1890, but it related to improvements admittedly made after the 1st day of January 1886. I therefore hold that it was void under Section 7 of the Act and was therefore not binding on the first defendant and therefore not upon those who claim through him.

The second question raised is whether the plaintiff is not entitled to deduct from the compensation payable the value of a certain reduction made in the rent in consideration of the said improvements. The amount of the reduction was 6 *paras* of paddy per annum, and this reduced rate of rent was enjoyed for 5 years; so that 30 *paras* of paddy is the amount claimed in reduction by the plaintiff under Clause (*c*) of Section 6 of the Act. I think the plaintiff is clearly entitled to make this deduction from the value of the improvements payable by him. It was urged that the reduction of rent, in order to be a good set-off against the value of improvements, should have been made in an existing rental, and not upon a new rental agreement such as A is. But I find that Exhibit A was only a renewal of an old lease held by the first defendant's father from the year 1859, and it may therefore be taken to be a continuation of the old lease and not a new lease. Even, however, if it was otherwise and the first

(1) 8 M. 284.

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defendant had been a stranger and a new-comer, he did as a fact get a reduction of rent upon the former lease amount in consideration of the improvements which he had acquired from the last tenant in whose shoes he stood in regard to them, and therefore it seems to me quite immaterial whether it was upon the old lease or the new one that the reduction is claimable, the fact being that in consideration of such improvements as existed on the land, the value of which the landlord has now to pay the tenant, the latter did get a reduction of rent.

The only other point is whether the plaintiff was chargeable with the whole of the costs of the commission, *viz.*, Rs. 15, the Commissioner's fee. I think that as the defendants made a claim for more than double what the Commissioner has found to be due to them, the fee for the Commissioner should have been divided equally between the plaintiff and the defendants as one side has gained as much as the other.

**[442]** The result is that there should be deducted from the amount payable for improvements by the plaintiff the value of 30 *paras* of paddy, namely, Rs. 15, the amount by which the rent was reduced and that the amount of the Commissioner's fee payable by the plaintiff to the defendants is reduced from Rs. 15 to Rs. 7½. With these modifications, I would dismiss the second appeal with proportionate costs.

Under Section 575 of the Code of Civil Procedure, the judgment of Mr. Justice SUBRAMANIA AYYAR prevails and the second appeal is dismissed with costs.

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**20 M. 442.**

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

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ARIYA PILLAI (*Appellant*), *Appellant v.* THANGAMMAL (*Respondent*), *Respondent.** [30th November, 1896.]

*Succession Certificate Act—Act VII of* 1889, *Sections* 9, 10—*Order for issue of certificate subject to security being given—Appeal,*

On a contested application for a succession certificate under Act VII of 1889, an order was made for the issue of the certificate on security being furnished by the applicant. The opposite party preferred an appeal against the order:

*Held*, that the appeal was maintainable.

[F., 6 Ind. Cas. 593 = 7 M.L.T. 246; Com., 26 A. 173 = 23 A.W.N. 225; R., 13 Bom. L.R. 1203 (1209); 4 Ind. Cas. 639 (640) = 139 P.R. 1908 = 4 P.L.R. 1909; 5 O.C. 213.]

APPEAL under Letters Patent, Section 15, against the judgment of Subramania Ayyar, J., in civil miscellaneous appeal No. 9 of 1896, rejecting an appeal which was preferred against the order of T. M. Horsfall, District Judge of Tanjore, on civil miscellaneous petition No. 526 of 1895.

The above petition was preferred in the District Court of Tanjore under Act VII of 1889 by the widow and opposed by the undivided brother of one Naga Pillai deceased. By the order appealed against the District Judge directed that the succes-**[443]**sion certificate should issue to the widow on her giving security which she subsequently did. The brother

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* Letters Patent Appeal No. 100 of 1896.

1896 Nov. 30. — APPELLATE CIVIL. — 20 M. 442.

appealed to the High Court and his appeal came on for disposal before Mr. Justice Subramania Ayyar, who delivered judgment as follows:—

SUBRAMANIA AYYAR. J.—On behalf of the respondent it is argued that the order appealed against was an interlocutory order against which no appeal lies (*Bhagawani* v. *Manhi Lal* (1).) This seems to be so as it appears that, after the security was furnished, the Judge passed on the 25th October 1895 an order granting the certificate. I therefore reject the appeal with costs.

The appellant now appealed as above under Letters Patent, Section 15.

*Seshagiri Ayyar*, for appellant.

## ORDER.

We are unable to agree with the learned Judge that an appeal does not lie. The Allahabad case on which he relies was considered and dissented from by a Bench of this Court in *Venkatasami Naik* v. *Chinna Narayana Naik* (2) which, however, does not appear to have been brought to the notice of the learned Judge.

We agree with the previous ruling of this Court.

On the merits, however, we find no ground for the appeal. There is no affidavit or other evidence to show that the District Judge refused to examine any witness whom the appellant desired to examine.

The Vakils on both sides were heard.

We dismiss the appeal.

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**20 M. 444=2 Weir 452.**

## [444] APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.*

QUEEN-EMPRESS *v.* VENKATARAM JETTI.* [14th January, 1897.]

*Criminal Procedure Code—Act X of* 1882, *Section* 11—*Sentence imposed in British India postponed till expiry of a sentence imposed in Mysore.*

It is competent to a Magistrate in British India to pass a sentence which should take effect after the expiration of a sentence in Mysore.

CASE reported for the orders of the High Court under Section 438 of the Code of Criminal Procedure by H. Bradley, District Magistrate of Coimbatore.

A person, who was undergoing a sentence of six years' rigorous imprisonment in the jail at Mysore, was tried by the Tahsildar-Magistrate of Kollegal in calendar case No. 135 of 1891 for the offence of theft in a building, and was convicted and sentenced to six months' rigorous imprisonment to take effect after the expiry of the sentence which he was undergoing in the Mysore Jail. The District Magistrate entertained a doubt as to whether it was legal for the sentence imposed in a British Court to be postponed until the prisoner had served out in a foreign jail a sentence imposed in a foreign Court. He accordingly reported the case for the orders of the High Court as above.

The Public Prosecutor (Mr. *Powell*), for the Crown.

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* Criminal Revision Case No. 549 of 1896.

(1) 13 A. 214. (2) Appeal against Order No. 32 of 894 (unreported).

1897 JAN. 14. — APPELLATE CRIMINAL. — 20 M. 444 = 2 Weir 452.

ORDER.

We think it was competent to the Magistrate to pass a sentence which should take effect at the only time when it could take effect, *viz.*, after the expiration of the sentence in foreign territory.

We therefore decline to interfere.

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20 M. 445 = 2 Weir 384.

## [445] APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

QUEEN-EMPRESS *v.* RAMALINGAM AND OTHERS.*
[30th October, 1896.]

*Criminal trial in Sessions Court—Examination of some of the witnesses bound over—Stopping the trial.*

Certain persons were tried in a Sessions Court for the offence of dacoity. Seven witnesses had been examined for the prosecution by the Committing Magistrate and were bound over to give evidence at the trial. After five witnesses have been examined, the Judge asked the jury whether they wished to hear any more evidence, and, on their stating that they did not believe the evidence and wished to stop the case, the Judge recorded a verdict of acquittal:

*Held*, that the procedure adopted was wrong, and that no final opinion as to the falsehood or insufficiency of the prosecution evidence ought to have been arrived at until the two remaining witnesses had been examined.

CASE of which the records were examined by the High Court under Section 439 of the Code of Criminal Procedure in calender case No. 38 of 1896 on the file of the Sessions Court of Tanjore.

Ten persons were tried for the offences of rioting, dacoity and mischief. The charges of the offences of rioting and mischief were withdrawn by the public prosecutor with the consent of the Court under Section 494 of the Code of Criminal Procedure. The trial on the charge of dacoity was stopped after the examination of five of the witnesses for the prosecution, when the jury stated that they did not believe the evidence, and the accused were acquitted.

The High Court sent for the records of the case under Section 435 of the Code of Criminal Procedure.

The Public Prosecutor (Mr. *Powell*), for the Crown.

*Ramanuja Rau*, for the complainant.

*Krishnasami Ayyar*, for the accused.

JUDGMENT.

The Sessions Judge having examined five witnesses for the prosecution and there being no further direct evidence of the offence, asked the jury whether they wished to hear any more evidence, and on their stating that they did not believe the evidence and wished to stop the case, the Judge recorded a verdict of [446] acquittal. We are unable to approve of the procedure adopted by the Sessions Judge. It is not warranted by any provision of law, and it might, under certain circumstances, lead to a failure of justice.

It appears that there were, in this case, two other witnesses examined before the Magistrate, and bound over to give evidence at the

* Criminal Revision Case No. 414 of 1896.

1896 Oct. 30. — Appellate Criminal. — 20 M. 445 = 2 Weir 384.

trial, whose evidence, if believed, would have corroborated the case for the prosecution, and might possibly have led the jury to form a different opinion of its credibility. No final opinion as to the falsehood or insufficiency of the prosecution evidence ought to be arrived at by the Judge or jury until the whole of that evidence is before them, and has been considered, and the jury ought, if need be, to be cautioned by the Judge to this effect. If, however, at the end of the prosecution evidence, the Public Prosecutor waives his right to sum up the evidence, where he has such right, and the jury then express an opinion that the evidence is incredible and the Judge agrees with them in such a case, we do not, as at present advised, say that it is necessary for the Judge to go through the formality of summing up the case to the jury. Their opinion might, in that case, we think, be at once accepted as a verdict. But we are clearly of opinion that this should not be done until the whole of the prosecution evidence has been duly recorded. In the present case, looking to the evidence recorded and all the circumstances, we do not think it necessary to do more than point out the proper procedure for the future guidance of the Sessions Judge.

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**20 M. 446.**

## APPELLATE CIVIL.

*Before Mr. Justice Davies and Mr. Justice Boddam.*

NATHURAM SIVIJI SETT (*Plaintiff*), *Appellant* v. KUTTI HAJI (*Defendant*), *Respondent*.* [26th January, 1897.]

*Civil Procedure Code, 1882, Section 252—Legal representative—Suit against the heir and possessor of the assets of a deceased person.*

Where a party is sued for money as the heir and possessor of the assets of a deceased debtor, and it is proved that he has received sufficient assets to meet the debt, a personal decree therefor can be passed against him.

[R., 16 C.L.J. 575 = 17 Ind. Cas. 963; 6 Ind. Cas. 397 = 8 M.L.T. 105.]

**[447]** SECOND appeal against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No. 565 of 1894, modifying the decree of K. Ramanatha Ayyar, District Munsif of Cannanore, in original suit No. 491 of 1893.

This was a suit for the price of articles purchased from the plaintiff, brought against the defendant as the heir and legal representative of the purchaser. The District Munsif passed a personal decree against him, which, on appeal, was modified by the District Court and altered to a decree passed against him as the legal representative of the deceased. The plaintiff appealed to the High Court.

Mr. *C. Krishnan*, for appellant.

*Sankara Menon*, for respondent.

## JUDGMENT.

The Judge is in error in stating that the defendant was sued only as legal representative of the deceased. He was in fact sued as the heir and possessor of the assets of the deceased. It having been proved in the suit that the defendant had received sufficient assets to meet the plaint debt, the Court of First Instance was justified in passing a personal decree

* Second Appeal No. 1213 of 1895.

against him in the suit for that debt, and it was not necessary to wait for execution proceedings to determine the extent of the defendant's personal liability as contemplated in Section 252 of the Code of Civil Procedure. The case of *Magalluri Garudiah* v. *Narayana Rungiah* (1) is in point rather than the case of *Janaki* v. *Dhanu Lall* (2), quoted by the Judge. We must, therefore, reverse the decree of the Lower Appellate Court and restore that of the District Munsif. The defendant (respondent) must pay the plaintiff's costs in this and the Lower Appellate Court. This disposes of the memorandum of objections which is simply dismissed.

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**20 M. 448 = 8 M.L.J. 79.**

## [448] APPELLATE CIVIL.

*Before Mr. Justice Davies and Mr. Justice Benson.*

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VENKAYYA (*Respondent*), *Appellant v.* RAGAVACHARLU (*Appellant*), *Respondent.** [26th February, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Section* 583*—Limitation Act—Act XV of* 1877, *Schedule II, Article* 79*—Application for restitution—Period of limitation—Fraud.*

Applications made to obtain restitution under a decree in accordance with Civil Procedure Code, Section 583, are proceedings in execution of that decree and are governed by Limitation Act, Schedule II, Article 179.

APPEAL under Letters Patent, Section 15, against the judgment of Mr. Justice Parker in appeal against order No. 13 of 1895 reversing the order of K. C. Manavedan Raja, Acting District Judge of Nellore, made in civil miscellaneous appeal No. 3 of 1894, affirming the order of P. Adinarayanayya, District Munsif of Kanigiri, made on execution petition No. 144 of 1894.

This was a petition put in under Civil Procedure Code, Sections 330 and 335, by the defendant in original suit No. 127 of 1879 on the file of the District Munsif of Kavali to obtain restitution.

The District Munsif rejected the application as being barred by the twelve years' rule of limitation overruling the petitioner's plea that he had been prevented by fraud from executing the decree.

The District Judge affirmed the decision of the District Munsif. The petitioner preferred an appeal to the High Court, which came on for hearing before Mr. Justice Parker, who said :—"I have no doubt that "proceedings taken for obtaining restitution under Section 583 of the "Civil Procedure Code are proceedings in execution of the decree. The "petition itself is put in under Section 230 and execution will be barred "under the twelve years' rule, unless defendant has by fraud or force been "prevented from executing the decree." He proceeded to refer to the allegations of fraud made by the petitioner and in the result set aside the order of the District Judge and remanded the case to be re-heard.

The respondent preferred the present appeal under the Letters Patent.

**[449]** *Seshagiri Ayyar*, for appellant.

*Ramachandra Rau Saheb*, for respondent.

### JUDGMENT.

We have no doubt but that the learned Judge is right in holding that applications made to obtain restitution under a decree in

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* Letters Patent Appeal No. 39 of 1896.

(1) 3 M. 359. (2) 14 M. 454.

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accordance with Section 583, Civil Procedure Code, are proceedings in execution of that decree, and are governed, as regards limitation, by Article 179 of the second schedule of the Limitation Act. This is in accordance with the view taken in *Nand Ram* v. *Sita Ram* (1).

The appellant's vakil relies on a remark in the case reported as *Kurupam Zamindar* v. *Sadasiva* (2) to the effect that the learned Judges in that case were disposed to think that the application in a similar case was governed by Article 178. That remark, however, is a mere *obiter dictum* and as such is not binding on us. One of the Judges who took part in that case is the learned Judge, whose order in the present case rules that Article 179 is the article properly applicable. The appeal, therefore, fails and we dismiss it with costs.

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**20 M. 449 = 7 M.L.J. 225.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

RAJA GOUNDAN (*Defendant*), *Appellant v.* RANGAYA GOUNDAN (*Plaintiff*), *Respondent.** [29th March, 1897.]

*Rent Recovery Act—Act VIII of* 1865 (*Madras*), *Section* 78—*Limitation—Suit to recover property wrongfully distrained.*

The plaintiff sued to recover certain property wrongfully distrained by the defendant who was his landlord, or in the alternative for its value. The defendant had tendered no patta to the plaintiff, but the distraint had taken place professedly under the Rent Recovery Act. The suit was not brought within six months from the date of the wrongful distraint:

*Held*, that the suit was not barred under Rent Recovery Act, Section 78.

[R., 27 M. 430.]

SECOND appeal, against the decree of W. J. Tate, District Judge of Salem, in appeal suit No. 181 of 1894, affirming the decree of [450] Syed Tajuddin Saheb, District Munsif of Namakal, in original suit No. 469 of 1893.

The plaintiff sued to recover certain property alleged to have been illegally distrained by the defendant who was his landlord more than six months before the institution of this suit. The defendant pleaded that the suit was barred under the six months' rule in Section 78 of the Rent Recovery Act.

The District Munsif overruled this plea and passed a decree in favour of plaintiff, and his decree was affirmed on appeal by the District Judge.

The defendant preferred this second appeal.

*Subramania Ayyar*, for appellant.

*Sundara Ayyar*, for respondent.

## JUDGMENT.

This was a suit by a tenant to recover specific property alleged to have been wrongfully distrained by his landlord, the defendant. The plaint prayed for the recovery of the property, or of its price, Rs. 100.

The defendant pleaded that the suit was barred by the special limitation prescribed under Section 78 of Rent Recovery Act (Madras) VIII

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* Second Appeal No. 14 of 1896.

(1) 8 A. 545. (2) 10 M. 66.

of 1865, as the suit was brought more than six months after the cause of action accrued. Section 78 enacts that "nothing in this Act contained "shall be construed to debar any person from proceeding in the ordinary "tribunals to recover money paid, or to obtain damages in respect of any-"thing professedly done under the authority of this Act:

"Provided that Civil Courts shall not take cognizance of any suit "instituted by such parties for any such cause of action, unless such suit "shall be instituted within six months from the time at which the cause "of action arose."

The District Judge held that the distraint was not an act professedly done under the law, but in defiance of it, inasmuch as no patta had, in fact, been tendered as required by law and he referred to *Srinivasa* v. *Emperumanar* (1) in support of his decision. He, therefore, held that the special limitation in Section 78 of Act VIII of 1865 did not apply, but that the case was governed by Article 49, Schedule II of the Indian Limitation Act, and confirmed the decree of the District Munsif awarding the plaintiff Rs. 60 as the value of the property distrained.

**[451]** The defendant appeals.

We are unable to agree with the District Judge that the appellant did not act professedly under the Rent Recovery Act, but in defiance of it. The case of *Srinivasa* v. *Emperumanar* (1) stands on a different footing from the present case. There the Sub-Collector, finding that the formalities required by the Act had not been observed, removed the attachment and directed the restoration of the property. The cause of action was the refusal to restore the property after such order. That could not, in any view, be regarded as a thing even professedly done under the Act. It was clearly a wrongful withholding of the property independently of any provisions of the Act. In the present case the distress professed to be made by the landlord under the provisions of the Act. The fact that no patta had previously been tendered, though it may affect the legality of the distress, does not alter its character as a thing done professedly under the Act. We, therefore, disagree with the ground on which the District Judge has based his decision. We, however, hold on other grounds that Section 78 is inapplicable.

The special limitation provided in that section must be restricted to the classes of suits specified in the section, *viz.*, to suits (1) to recover money paid and (2) to obtain damages in respect of anything professedly done under the Act. The present suit was for the recovery of specific moveable property, and therefore does not fall within the category under Section 78. We are satisfied that the suit was not brought in this form in order to evade the limitation provided by Section 78. The suit was for a jewel and a brass pot, and there was no allegation on either side that the property had been sold prior to the suit. The mere fact that there was an alternative prayer for the value of the property, does not alter the essential character of the suit as one for recovery of specific moveable property.

As Section 78 is inapplicable, the limitation is that prescribed by Article 49, Schedule II of the Indian Limitation Act, and the suit is not barred.

We, therefore, confirm the decrees of the Courts below and dismiss this second appeal with costs.

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(1) 2 M. 42.

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20 M. 452 = 7 M.L.J. 229.

20 M. 452=7 M.L.J. 229.

## [452] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

RAMASAMI KOTTADIAR AND OTHERS (*Defendants*), *Appellants v.* MURUGESA MUDALI AND OTHERS (*Plaintiffs*), *Respondents.**
[7th and 8th April, 1897.]

*Insolvent—Vesting order—Subsequent attachment—Dismissal of insolvency petition—Creditor's trustees.*

A judgment-debtor was declared an insolvent by the Court for the Relief of Insolvent Debtors, Madras, and a vesting order was made. Part of his property was subsequently attached in execution of a decree. Afterwards, his petition in insolvency was dismissed and the vesting order discharged. On the same date a creditor's trust deed was executed, of which the plaintiffs were the trustees. They now sued to set aside the proceedings in execution and to cancel the sale of the property which had been sold in execution after the date of the trust deed:
*Held*, that the suit was not maintainable.

[Appr., 27 M. 7=13 M.L.J. 372; R., 16 C.L J. 162=14 Ind.Cas. 519.]

SECOND appeal against the decree of T. Ramachandra Rau, Subordinate Judge of Trichinopoly, in appeal suit No. 165 of 1892, reversing the decree of T. M. Rangachariar, District Munsif of Trichinopoly, in original suit No. 377 of 1890.

The plaint set forth that certain immoveable properties now in question belonged to Venkatesa Tawker; that he applied to the High Court, Madras, on 11th January 1888, to be declared insolvent, whereupon on the same day, the High Court passed an order vesting the properties in the Official Assignee; that, subsequently, Venkatesa Tawker entered into an arrangement with his creditors, by which the plaintiffs and one Rangachariar were appointed trustees for the purpose of clearing off all his debts; that, under the composition deed (which was executed on 17th December 1888), the properties in question passed frow the Official Assignee to the trustees with the consent of the majority of the creditors; that first defendant, one of the creditors, in execution of his decree against Venkatesa Tawker, attached the properties now in question on the 23rd January and 7th February 1888; that plaintiffs applied to have the attachment cancelled, but their application was dismissed on 3rd July 1889; that the properties were then brought to sale with the result that first defendant bought [453] item 1, second defendant 2nd item, and third defendant 5th item. Plaintiffs therefore prayed that the proceedings in execution should be set aside and the sale cancelled.

The District Munsif dismissed the suit, but his decree was reversed on appeal by the Subordinate Judge, who decided in favour of the plaintiffs.

The defendants preferred this second appeal.

*Krishnasami Ayyar*, for appellants.

*Tiagaraja Ayyar*, for respondent No. 1.

## JUDGMENT.

The plaintiffs as trustees, appointed by one Venkatesa Tawker for the payment of his debts, sued to set aside the attachment of Tawker's property made by one of his creditors, and also to set aside certain sales

* Second Appeal No. 1723 of 1895.

made under the attachment. Before the order of attachment was issued, Tawker had applied to the Commissioner of Insolvency, Madras, to be declared an insolvent, and a vesting order had been made. Subsequent to the issue of the attachment, the insolvency petition was dismissed, and the vesting order discharged. The order of attachment was not objected to, nor was it withdrawn before the vesting order was discharged. Some of the properties attached were afterwards sold in pursuance of the attachment and were purchased by the defendants. The rest of the property remained under attachment. The plaintiffs were appointed trustees by an instrument of the same date as the discharge of the vesting order. They contend that the attachment having been made during the continuance of the vesting order, the judgment-debtor had no interest on which the attachment could operate, and that it was, therefore, invalid as against them. We do not think that this argument is sound. The effect of the proviso to Section 7 of the Insolvency Act (11 & 12 Vic., Cap. 21) was to revest Tawker's property in him as from the date of the vesting order, subject, however, to all acts done by the assignee, or under his authority, during the continuance of the vesting order.

1897 APRIL 8.

APPELLATE CIVIL.

20 M. 452 = 7 M.L.J. 229.

We think, therefore, that the attachment may properly be held to be capable of operating on Tawker's property as from the date of its first issue; but, in any case, it must be held to have taken effect from the moment of the discharge of the vesting order. That being so, it took effect, in any view, before the plaintiffs acquired an interest under the trust deed. The decree of the Sub-Judge must, therefore, be set aside, and that of the [454] District Munsif dismissing the suit restored. The plaintiffs must pay defendants' costs throughout. The suit having been disposed of on the grounds stated above, it is not necessary for us to decide the other question argued before us as to whether Section 42 of the Specific Relief Act is a bar to the suit as framed.

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**20 M. 454.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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SANKARA SUBBAYYAR (*Defendant No.* 2), *Appellant v.* RAMASAMI AYYANGAR AND ANOTHER (*Plaintiff and Defendant No.* 1), *Respondents.** [9th and 13th April, 1897.]

*Inam attached to the hereditary office of nattamgar—Enfranchisement of inam lands in favour of two persons—Suit by the holder of the office to recover land.*

Inam lands constituting the emolument of the office of nattamgar, was enfranchised in favour of the plaintiff and defendant separately. In November 1890 the defendant was informed that a patta for half of the lands would be issued in his name, and it was so issued in the following May. In April 1891 (after the resolution to enfranchise the land was come to) the plaintiffs was appointed to be the sole nattamgar, and he now sued in 1894 for the cancellation of the enfranchisement patta issued to the defendant, and for the issue of a patta in his own name in respect of the lands comprised therein and for possession of the lands:

*Held*, that the plaintiff was not entitled to the relief sought.

[R., 27 C. 242.]

SECOND appeal against the decree of W. Dumergue, District Judge of Madura, in appeal suit No. 446 of 1895, reversing the decree of

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* Second Appeal No. 547 of 1896.

1897 April 13. — Appellate Civil. — 20 M. 454.

V. Kuppusami Ayyar, District Munsif of Tirumangalam, in original suit No. 56 of 1894.

The plaintiff sued to recover certain land which formed part of the emoluments attached to the hereditary office of nattamgar in the village of Thadayampatti held by him.

The office of nattamgar in the village of Thadayampatti was jointly held, from the time of the *faisal* until 1873, by two persons, members of different families, of which the plaintiff and the second defendant were the respective representatives, and the *manibam* lands were enjoyed in equal shares by the office holders. In 1873 **[455]** the second defendant's brother was dismissed for misconduct and thenceforward until 1889, when the second defendant's right to a moiety of the office was recognised by the Revenue authorities, the duties were performed by the plaintiff's father and the plaintiff with exclusive possession of the emoluments. In February 1890, after litigation under Regulation VI of 1831, the second defendant was formally appointed second nattamgar by order of the Deputy Collector, dated 23rd January 1890, but in the revision of village establishments which was undertaken the same year, it was decided that one nattamgar for the village was enough. The second defendant was accordingly displaced and the plaintiff was appointed sole nattamgar by the Deputy Collector on the 18th August 1890. The Collector set the Deputy Collector's order aside and appointed the second defendant as sole nattamgar on the 3rd January 1891, but, on the plaintiff's appeal, the Board of Revenue reversed the Collector's order on the 27th April 1891, and restored that of the Deputy Collector by which the plaintiff had been appointed sole nattamgar. Meanwhile the Village Cess Act IV of 1864 had been introduced into the district, and in enfranchising Village Service Inams the Inam Commissioner issued an enfranchisement patta in favour of the second defendant for a moiety of the lands which had formed the Inam of the Thadayampatti Nattamgar's office. The date of this enfranchisement patta is the 4th May 1891, and in August 1893, the Collector of the district ordered the sub-division of the lands into moieties, whereupon the plaintiff instituted this suit against the second defendant as the holder of the enfranchisement patta for half the land and against the Secretary of State for India in Council as the first defendant. The reliefs which the plaintiff sought were the cancellation of the enfranchisement patta granted to the second defendant, a declaration of his own right to the lands included in that patta, the issue of the patta for those lands also in his own name, and an injunction restraining the defendants from sub-dividing the lands.

The District Munsif dismissed the suit.

On apppeal the District Judge reversed the decision of the District Munsif and passed a decree as prayed against the Secretary of State and defendant No. 2.

Defendant No. 2 preferred this second appeal.

*Pattabhirama Ayyar* and *Mahadeva Ayyar*, for appellant.

*Sivasami Ayyar*, for respondent No. 1.

## JUDGMENT.

**[456]** The land itself (not its assessment) was the inam of the office, set apart by Government as its emolument. For a long time prior to 1873 there were two nattamgars, belonging to different families —those of the plaintiff and of the second defendant, respectively. Second defendant's brother was removed from the office in 1873. The

plaintiff then discharged the whole duty of the office, being regarded as a mere temporary occupant in so far as concerned the duties and emoluments attaching to the second defendant's family. Subsequently the second defendant sued under Regulation 6 of 1831 and eventually established his right to the office vacant by his brother's removal and to its emoluments. In pursuance of this decision he was actually put in possession of the office and received a share of the emoluments. This was in the beginning of 1890. In the same year the Government resolved to enfranchise the lands attached to both the offices and to appoint a single person to do the duty of both offices and to pay him a money salary. Second defendant was at first selected for the office; but eventually the plaintiff was appointed. Contemporaneously with these proceedings, steps were taken to carry out the enfranchisement, and the second defendant was informed in November 1890 that patta for half of the lands would be issued in his name and it was so issued in May 1891. The appointment of the plaintiff as sole office-holder was in April 1891. The plaintiff's contention is that, as he alone was in office when the patta was issued in May 1891, he alone was entitled to receive the patta for all the lands. This view was accepted by the Lower Appellate Court, but we are unable to support it. The exact day on which the resolution to enfranchise the land was come to does not appear, but it certainly was before the plaintiff was appointed sole nattamgar. It is also clear that the enfranchisement was made on the footing that each nattamgar was entitled to a moiety of the land. In the circumstances, this was the only reasonable and proper course for Government to adopt, and we are unable to see on what grounds the plaintiff can validly dispute it.

We think that the enfranchisement of half the land in second defendant's name was in accordance with the principle accepted in the Full Bench case (*Venkata* v. *Rama* (1)) referred to **[457]** by the District Judge, inasmuch as the right of the second defendant, established by the suit under Regulation 6 of 1831, was never subsequently set aside or even disowned by the Revenue authorities. The appointment of the plaintiff as sole nattamgar in April 1891 was never intended to affect the right of the second defendant to the moiety of the lands. It was merely an act of policy on the part of the Government for the more convenient discharge of the duties of the office and could only affect the right of the second defendant from the date of such appointment. We do not think it would be reasonable, nor is there any authority for holding that the plaintiff's appointment in April 1891 should have effect retrospectively so as to divest the second defendant of the right which had vested in him by the prior order to enfranchise half the lands in his name. We must therefore reverse the decree of the District Judge and restore that of the District Munsif. First respondent must pay appellant's costs in this and in the Lower Appellate Court.

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(1) 8 M. 249.

1897
JULY 22.

APPELLATE CRIMINAL.

20 M. 457.

20 M. 457.

## APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.*

QUEEN-EMPRESS *v.* MUTHAYYA.* [22nd July, 1897.]

*Criminal Procedure Code—Act X of* 1882, *Section* 83—*Breach of Contract Act—Act XIII of* 1859—*Warrant.*

Criminal Procedure Code, Section 83, is applicable to warrants issued under Breach of Contract Act, 1859, and they can be executed outside the jurisdiction of the Court which issued them.

CASE referred for the orders of the High Court by K. C. Manavedan Raja, Acting District Magistrate of Anantapur, under Criminal Procedure Code, Section 438.

The case was stated as follows :—

"In this case the District Magistrate of Coorg issued a warrant for "the arrest of one Muthayiga, a resident of Nassanakota [458] village of "Dharmavaram taluk in this district, on the ground that he had received "an advance of money amounting to Rs. 30 from a recruiter of labour "named Homna Maistry under an agreement to work in the Habri Coffee "Estate from 25th March 1896 to 25th March 1897 at the rate of wages "usually paid or prevalent at that place, and had failed to carry out the "terms of the contract. The warrant directed that he should be produced "before the District Magistrate unless he can give bail himself in the sum "of Rs. 30 with a surety in the sum of Rs. 60 to appear before him on "21st December 1896. The man applied to the Head Assistant Magis-"trate to be allowed time to produce bail and was remanded for a day "pending its production and then released.

"It is doubtful whether the provisions of the Criminal Procedure Code, "1882, relating to warrants apply to warrants issued under Act XIII of "1859, and whether a warrant under the Act can be executed at all out-"side the jurisdiction of the Court which issues it. On the one hand the "words of Section 83 of the Code are unqualified and so far appear to "apply to all warrants. On the other hand they may be restricted to war-"rants 'issued under the Code' by virtue of Sections 75 and 93, which seem "to apply to the whole chapter. It is to be noted that though a warrant "may issue under Section 1 of Act XIII of 1859, no 'offence' has been "committed until the Magistrate has made an order and that order has "been disobeyed; and it appears very hard that the special procedure pro-"vided by that Act which applies in certain cases penal provisions to the "breach of a civil contract should be capable of being employed to drag "labourers many hundred miles from their homes to answer a charge of "such breach. I request, therefore, that it may be decided by an author-"itative ruling whether the existing law permits of such procedure. I "beg further to add that the warrant in the case under report purports to "have been issued under Section 75, Criminal Procedure Code."

The Public Prosecutor (Mr. *Powell*), for the Crown.

ORDER.

We are clearly of opinion that Section 83 of the Criminal Procedure Code is applicable to warrants issued under the provisions of the Act

* Criminal Revision Case No. 74 of 1897.

[*N.B.*—The same ruling was given in 20 M. 235, *supra.*—ED.]

XIII of 1859. There are no words in that section limiting the operation of it to warrants issued under the Code. The reference to warrants issued under the Code made [459] in Sections 75 and 93 cannot, we think, be taken to have the effect suggested. It cannot be supposed that, if when the Codes of 1861 and 1872 were in force, the sections in them corresponding to Section 83 of the present Code were applicable to warrants issued under Act XIII of 1859, that state of the law was intended to be altered in the Code of 1882. To hold that none of the provisions of Chapter VI of the Code apply to such warrants would lead to the conclusion that there is no provision made for the issuing or executing of them. It is not necessary to say whether, under the Act of 1859, breach of contract is constituted an offence. The language of the Act appears to us to indicate that such was the intention of Legislature, but at any rate the Act authorizes the Magistrates, on a complaint being made, to issue a warrant, and the only question is whether the provisions of the Criminal Procedure Code apply to that warrant. We think that the provision in question does apply.

1897 JULY 22. — APPELLATE CRIMINAL. — 20 M. 457.

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**20 M. 459.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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PARVATHI AMMAL (*Plaintiff*), *Appellant v.* SUNDARA MUDALI (*Defendant*), *Respondent.** [23rd July, 1897.]

*Hindu Law—Partition of land between widow and mother of the last male owner—Widow's right on death of mother.*

The widow and mother of a land-owner, who died without issue, divided his land between them in 1869. The mother sold her share of the land in 1870, and died in 1890. The widow now sued in 1893 to recover the property from the vendee:

*Held*, that the suit was not barred by limitation and the plaintiff was entitled to recover.

SECOND appeal against the decree of S. Russell, District Judge of Chingleput, in appeal suit No. 272 of 1894, reversing the decree of P. S. Gurumurthi Ayyar, District Munsif of Poonamallee, in original suit No. 426 of 1893.

[460] Suit to recover possession of land with mesne profits computed from December 1890. The last male owner of the land in question was the plaintiff's husband, who died without issue, leaving besides his widow, Agiammal his mother. On his death disputes arose between the plaintiff and Agiammal, which were compromised under an instrument filed as Exhibit I in the suit, whereby the property now in question passed to Agiammal, from whom it passed by sale to the present defendant under a conveyance, dated 12th December 1870 The plaintiff's case was that the land in question was under Exhibit I allotted to Agiammal for her maintenance, and that Agiammal having died in December 1890, the plaintiff was entitled to possession and to mesne profits as prayed.

The District Munsif passed a decree for the plaintiff, but his decree was reversed on appeal by the District Judge, who held that Agiammal took an absolute interest in the property, and that the property had been held adversely to the plaintiff for more than twelve years.

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* Second Appeal No. 689 of 1896.

1897
JULY 23.
APPELLATE
CIVIL.
20 M. 459.

Plaintiff preferred this second appeal.

*Krishnasami Chetty*, for appellant.

*Pattabhirama Aiyar*, for respondent.

JUDGMENT.

The parties to Exhibit I are Hindus related to each other as mother-in-law (under whom defendant claims) and daughter-in-law (plaintiff). By this instrument they arranged for their respective enjoyment of the property left by the late husband of the plaintiff. They divided the property between them. The mother-in-law alienated a portion of the property assigned to her enjoyment. She has since then died, and the plaintiff now sues to recover the property from the alienee. The question is whether, under Exhibit I, the deceased took a life estate only, or a larger interest. The District Judge has held that she took an absolute estate, the intention being to transfer the property absolutely in lieu of all future claims for maintenance. We cannot accept this construction. There are no express words to indicate such intention. The words referring to enjoyment do not indicate anything more than an enjoyment for life. The respondent relies on the provision in the document that neither party shall sell her share of the house and backyard except to the other party. No doubt this provision implies that the parties contemplated the possible alienation of the other properties, but there is nothing to suggest that the alienation contemplated was more [461] than that of the life interest of the alienor. Such alienation would have been perfectly legal, whether they had agreed to it or not, and the provision relating to the house and backyard was nothing more than a mutual limitation of that power made by each in favour of the other in respect of that portion of the property, the transfer of which to a stranger during the lifetime of the other would have been specially inconvenient. The general tenor of the arrangement under Exhibit I does not suggest that the parties contemplated any alienation by each party to enure beyond the life of the alienor, and it is difficult to see what object they could have had in providing that the survivor should be bound by the alienations of the other after the death of the latter.

In the absence of express terms or clear indications to the contrary the presumption is that the parties, being Hindu females, did not intend to create in each other an absolute estate. Their intention was to create a life estate only. As to the question of limitation, the mother-in-law, who had only a life estate having died in 1890, the plaintiff's suit for possession is clearly not barred by limitation.

We must, therefore, reverse the decree of the Lower Appellate Court and restore that of the District Munsif with costs in this and in the Lower Appellate Court.

20 M. 461 = 7 M.L.J. 269.

1897 AUG. 10.

APPELLATE CIVIL.

20 M. 461 = 7 M.L.J. 269.

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.*

BARBER MARAN AND ANOTHER (*Defendants Nos. 1 and 2*), *Appellants v.* RAMANA GOUNDAN AND ANOTHER (*Plaintiffs and Defendant No. 3*), *Respondents.** [29th July and 10th August, 1897.]

*Contract Act—Act IX of* 1872, *Sections* 38, 42, 43, 45*—Joint promisee—Discharge by one of two joint mortgagees.*

The sum due upon a mortgage was paid to one of the two mortgagees, and he gave an acquittance without the knowledge of the other mortgagee who now **[462]** brought this suit upon the mortgage. It appeared that there was no fraud on the part of the mortgagors and that the mortgagee who received payment was not the agent of the plaintiff in that behalf:

*Held*, that the mortgage had been discharged and the plaintiff was not entitled to sue.

[**Diss.**, 25 M. 26; 17 C.L J. 372 (375); 5 Ind. Cas. 343 (345); **R.**, 32 A. 164 (166) = 7 A.L J. 99 = 5 Ind. Cas. 129; 34 C. 305 = 5 C.L.J. 270; 25 M. 431 (**F.B.**); 35 M. 685 (687) = 10 Ind. Cas. 874 = 21 M.L.J. 508 (517) = (1911) 2 M.W.N. 442; 1 Ind. Cas. 219; 5 Ind. Cas. 43 = 20 M.L.J. 709 (719) = 7 M.L.T. 253; 8 Ind. Cas. 416 = 14 O C. 45 (47); 24 M.L.J. 333 = 13 M.L.T. 268 = (1913) M.W.N. 328 (332); **Doubted**, 27 B. 292; 1 N.L.R. 24; **D.**, 38 C. 342 (349) = 13 C.L.J. 3 = 8 Ind. Cas. 837.]

SECOND appeal against the decree of M. B. Sundara Rau, Subordinate Judge of Coimbatore, in appeal suit No. 95 of 1895, reversing the decree of S. Krishnasami Ayyar, District Munsif of Erode, in Original Suit No. 431 of 1894.

Suit to recover principal and interest due on a mortgage, dated 13th May 1891, and executed by defendants Nos. 1 and 2 in favour of the plaintiff and defendant No. 3. The mortgagors pleaded that the mortgage had been discharged, and it appeared that three years before this suit they had paid to defendant No. 3 the sum then due upon the mortgage and received from him a receipt; but the plaintiff was not present at the time and had not received the money, and defendant No. 3 was not his agent for the purpose of receiving it. The District Munsif dismissed the suit, but his decree was reversed on appeal by the Subordinate Judge who passed a decree for the plaintiff.

The mortgagors preferred this second appeal.

*Mahadeva Ayyar*, for appellants.

*Kasturi Rangayyangar*, for respondent No. 1.

## JUDGMENT.

The question raised by this appeal is whether a payment made to one of two persons jointly entitled under a mortgage bond can be pleaded as a valid discharge of the debt in an action brought by the other person interested in the bond. It is found that the party who received payment was not the agent in that behalf of the plaintiff. On the other hand it is not suggested that there was any fraud on the part of the defendants who made the payment. The appellants' vakil in support of his contention that the payment to one joint creditor was a valid discharge of the debt as against

* Second Appeal No. 1010 of 1896.

1897 AUG. 10. — APPELLATE CIVIL. — 20 M. 461 = 7 M.L.J. 269.

the other referred to in Section 38 of the Contract Act and to the English case of *Wallace* v. *Kelsall* (1). "An offer to one of several joint promisees "has the same legal consequences as an offer to all of them." That is the language of the last paragraph of the section. In the first part of the section it is provided that, where an offer of performance has been [463] made and not accepted, the promisor is not responsible for non-performance. It follows that, when a legal tender has been made to one of two joint promisees and refused by him, the promisor is discharged from liability in respect of his promise. It would be difficult to reconcile with this proposition the view adopted by the Subordinate Judge, *viz.*, that the defendants were not discharged by the payment made to the party jointly entitled with the plaintiff. But it is argued on the first respondent's behalf that Section 45 of the Act, by declaring the right of the several joint promisees to performance, makes it incumbent on the debtor to satisfy them all before obtaining a complete discharge. It is also suggested that the fact of the creditor being a mortgagee makes a material difference. With regard to Section 45, we cannot see that the declaration that the several joint promisees are entitled to performance is otherwise than consistent with English Law or that, unless it be construed as converting the joint rights under a contract into several rights, it conflicts with the last paragraph of Section 38. To put that construction on the section would amount to saying that, where a contract is made in favour of more than one person, they must be taken to be severally entitled under it, for they cannot be jointly and severally entitled (*Keightley* v. *Watson* (2), Bullen and Leake's Precedents, 3rd edition, page 471). There is no reason whatever to suppose that this was intended by the Legislature. A somewhat similar contention was raised in *Hemendro Coomar Mullick* v. *Rajendrolall Moonshee* (3) with reference to Section 43 of the Act as affecting the obligation of persons liable for a debt. The point there decided on the authority of *King* v. *Hoare* (4) was that a decree against one joint debtor was a bar to an action afterwards brought against the others. The Court refused to accede to the contention that, since the passing of the Contract Act, the rule in *King* v. *Hoare* (4) had become inapplicable, because the effect of Section 43 was to enable a promisee to sue one or two of his joint promisors severally in two or more suits. Taking together Sections 42, 43 and 45, we find that the Legislature has declared against the common law rule of survivorship as well in the case of joint creditors as in that of joint debtors. Further in Section 44, the Act has abolished the rule of English Law according to which the release of one joint [464] debtor operates to release his co-debtors. For the proposition that the Legislature intended to go beyond this and refuse recognition altogether to rights or liabilities *in solidum*, we do not think that there is any foundation. We think that effect must be given to the plain language used in Section 38 and that the question above stated must be answered in the affirmative. So construed the section is consistent with Section 165 which lays down the rule that a bailee who has taken goods from several joint owners may deliver them back to one without the consent of all. It is also consistent with the common law case of *Wallace* v. *Kelsall* (1) and does not as far as we can ascertain conflict with any other case except one which might have been cited in support of the respondents and which we think it well to mention, lest it should be supposed that it has been

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(1) 7 M. & W. 264. (2) 3 Ex. 723.
(3) 3 C. 353. (4) 13 M. & W. 494.

1897 AUG. 10. — APPELLATE CIVIL. — 20 M. 461 = 7 M.L.J. 269.

overlooked. We refer to *Steeds* v. *Steeds* (1), the material facts of which are similar to those in *Wallaçe* v. *Kelsall* (2). In both the cases one of the joint creditors who joined in the action had been satisfied by payment or otherwise. In *Wallace* v. *Kelsall* (2) the plea was held good on demurrer. In *Steeds* v. *Steeds* (1) the statement of defence was held to be good only as regards the plaintiff who had been satisfied and his share of the debt. The cases cited in the judgment in *Steeds* v. *Steeds* (1) do not, in our opinion, altogether support the conclusion arrived at. They go to show that, in equity, persons lending money to a third person are deemed to be tenants in common, and not joint tenants as well of the debt as of any security held for it. Some of the cases refer to the presumption in favour of tenancy in common as against the rule of survivorship; while *Watson* v. *Dennis* (3) which is also cited, is to the effect that a purchaser of property comprised in a mortgage would not be compelled to accept the title when it appears that the receipt for the money paid to discharge the mortgage was signed by one only of the mortgagees. Lord Justice Knight Bruce in holding that the estate was not fully discharged by such a receipt carefully avoids expressing an opinion as to the question which might arise in an action for the mortgage money. In the present case it may be that a purchaser of the mortgaged property might rightly have refused to complete on the ground that the plaintiff, one of the mortgagees, was not ready to give a receipt or acknowledgment for **[465]** the mortgage money. But, when the question asises in an action to recover the debt, we cannot see that it makes any difference that the debt was secured by a mortgage. If the debt has been satisfied by payment, the rights under the mortgage instrument are extinguished and the action must fail. The law entitles a mortgagor to a registered receipt for his mortgage money, but does not exclude other evidence of payment or make the giving of the receipt a condition precedent to the discharge of the property. In our opinion the mortgage amount was discharged by payment made to the plaintiff's co-mortgagee and therefore the suit should have been dismissed.

The decree of the Lower Appellate Court is set aside and that of the District Munsif restored with costs in this and in the Lower Appellate Court.

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**20 M. 465 = 7 M.L.J. 246.**

## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Davies.*

RAMASAMIA PILLAI (*Plaintiff*), *Appellant v.* ADINARAYANA PILLAI AND OTHERS (*Defendants Nos.* 1 *to* 3), *Respondents.**
[23rd August, 1897.]

*Transfer of Property Act—Act IV of* 1882, *Section* 53—*Transfer in fraud of creditors—Good faith.*

When it is said that a deed is not executed in good faith, what is meant is that it was executed as a mere cloak, the real intention of the parties being that the ostensible grantor should retain the benefit to himself.

[R., 25 B. 202; 34 C. 999 = 6 C.L.J. 410 = 11 C.W.N. 889; 30 M. 6 = 16 M.L.J. 427 = 1 M.L.T. 351; 5 Bom. L.R. 213; 13 C.P.L.R. 180; 10 M.L.J. 234.]

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* Second Appeal No. 1277 of 1896.

(1) L.R. 22 Q.B. D. 540. (2) 7 M. & W. 264. (3) 4 De G. J. & S. R. 345.

1897 AUG. 23. — APPELLATE CIVIL. — 20 M. 465= 7 M.L.J. 246.

SECOND appeal against the decree of H. T. Ross, District Judge of Tinnevelly, in appeal suit No. 382 of 1894, reversing the decree of T. Sadasiva Ayyar, District Munsif of Srivaikuntam, in original suit No. 660 of 1893.

Suit to recover principal and interest due on the mortgage, dated 6th December 1886, and executed by defendant No. 1 in favour of the plaintiff. The land comprised in the mortgage had been attached and brought to sale in execution of a decree against the mortgagor and purchased at the Court-sale in January 1890 by **[466]** defendant No. 2. Defendant No. 3 was under contract to purchase the property from defendant No. 2. Defendant No. 1 did not defend the suit. The other defendants pleaded that the mortgage was executed for no consideration in order to defeat and defraud the claim of defendant No. 3, the creditor of the mortgagor.

The District Munsif passed a decree for the plaintiff. On appeal the District Judge held that the mortgage was supported by consideration, but after a review of the facts disclosed by the evidence he said :—

"The effect of all these circumstances taken together is to point "strongly to these two persons, the plaintiff and the first defendant "having acted in concert with intent to defeat the third defendant by "means of this document Exhibit A.

"I find, therefore, that this transaction, though it cannot be said to "be without consideration, poor as its consideration was in the circum-"stances, was certainly not entered into by the plaintiff in good faith, and "that it was a transaction made with intent to defeat the creditors of the "first defendant. To obtain the protection of the last clause of Section "53 of the Transfer of Property Act, the plaintiff would have to be trans-"ferred both in good faith and for consideration. These two conditions "are however not fulfilled in the present case."

In the result the District Judge reversed the decree of the District Munsif and dismissed the suit.

Plaintiff appealed.

*Ramachandra Rau Saheb* and *Ramakrishna Ayyar*, for appellant.

*Pattabhirama Ayyar* and *Sivasami Ayyar*, for respondents.

## JUDGMENT.

On the facts found by the District Judge we do not think he was justified in his conclusion that the transaction was in fraud of creditors.

The Judge finds there was good consideration for the mortgage, but considers that the want of good faith brought the case within the purview of Section 53 of the Transfer of Property Act. The reference to good faith occurs only in the proviso to the Section.

It has first to be seen whether there was intent to defraud creditors within the meaning of the former part of the section. When it is said that a deed is not executed in good faith what is meant is that it was executed as a mere cloak, the real intention of the parties being that the ostensible grantor should retain the **[467]** benefit to himself (*ex-parte Games* (1)). There is nothing to show that there was want of good faith in that sense in the present case. Section 53 cannot be understood and correctly applied without reference to the English cases on which the section is really founded.

We must reverse the decree of the District Judge and restore that of the District Munsif.

Respondents must pay costs in both Appellate Courts.

(1) L.R. 12 Ch. D. 314.

20 M. 467.

1897 Sep. 10. — Appellate Civil. — 20 M. 467.

## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Davies.*

SESHAMMA AND ANOTHER (*Plaintiffs*), *Appellants* v. CHENNAPPA (*Defendant*), *Respondent*.* [10th September, 1897.]

*Construction of will—Appointment of executors by implication—Civil Procedure Code, Sections* 27, 53—*Amendment of plaint by bringing on a new plaintiff on second appeal.*

Plaintiffs sued in 1894 to recover property belonging to the estate of a testator, claiming to be his executors under a will. The property was alleged to have been entrusted by the testator in 1893 to the defendant. The will contained no express appointment of executors, but it provided that the plaintiffs should take care of the estate during the minority of a son who was to be adopted to the testator, and imposed upon them the duty of providing for the maintenance of persons therein named :

*Held*, (1) that the plaintiffs were not appointed executors by implication ;

(2) that, under the circumstances of the case, the plaint should be amended on second appeal in 1897, by substituting the adopted son as plaintiff, with one of the present plaintiffs as his next friend.

[R., 33 C. 657 = 10 C.W.N. 662 ; 33 M. 115 = 5 Ind. Cas. 931 = 7 M.L.T. 185 ; 5 C.W.N. 273 ; 2 L.B.R. 4 ; 4 L.B.R. 95 ; 3 O C. 347.]

SECOND appeal against the decree of E. J. Sewell, District Judge of North Arcot, in appeal suit No. 986 of 1895, affirming the decree of T. Sami Ayyar, District Munsif of Chittoor, in original suit No. 421 of 1894.

The plaintiffs sued as the executors of the will of one Ramappanayanivaru to recover from his brother certain jewels alleged to have been entrusted to him by the testator on 5th November 1893. The will set up was as follows :—

"Will, dated 29th October 1893, executed by Ramappanayani Garu, "&c.

"**[468]** 1. As we have no children by the two wives, whom we have "married according to the customs and ways of our caste, as we have "been falling sick now and then by reason of our old age and have been "ill at present, the two wives we have married according to the customs "and ways of our caste, Subbambi and Laxmambi should both continue "to live in the very same palace at Pullur where we have been living and "should enjoy after our death, all the moveable and immoveable properties "with all the rights and privileges we possessed in respect thereto, which "have been under our possession and enjoyment in virtue of the partition "deed executed between us and our brother Chennappanayanivaru.

"2. As Subbambi, the senior of our two wives, has female issue, you, "the junior wife, Laxmambi, should act in accordance with her will, and "in case you do not beget male issue during my lifetime, should adopt "some boy among my relatives whom Subbambi likes, and after him "should adopt another boy and do so any number of times and thus "should protect (perpetuate) our family.

"3. Our son-in-law M. R. Ry. Bangaru Seshamanayanivaru, "Sriman Mahanayakacharylu, the Zamindar of Bangarupallam, and my "father-in-law M. R. Ry. Irri Vengatapa Nayanivaru, Inamdar of Mopi "Reddipalle, should take care of the aforesaid properties until the said

* Second Appeal No. 385 of 1897.

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"adopted boy attains majority and becomes capable of managing the same. "[These persons were the present plaintiffs.]

"4. Laxmi who has been under our protection for a long time "with her three children—two sons—Sarangapani and Cumara Ramudu "and one daughter, Janaki, and the children that she may in future beget "through me should live with my wives at the place where they live in "the palace at Pullur. . . . . . .

"7. The persons who are taking care of the said properties and the "adopted son after he takes possession of the same should pay to Laxmi's "present male and female children and those whom she might beget "through me in future some adequate amount out of the said property "required for all their expenses.

"8. The persons who take care of the said properties should pay "out of the same for all expenses of our legal wife's daughter, adopted "boy, our wives and for our family."

The District Munsif held that the will was not genuine and dismissed the suit.

**[469]** On appeal, the District Judge affirmed the decision of the District Munsif on the ground (not taken by the defendant) that the plaintiffs had no right to maintain the suit even if the will was genuine.

The plaintiffs preferred this second appeal.

*Sundara Ayyar*, for appellants.

*Srirangachariar*, for respondent.

## JUDGMENT.

We are not satisfied that this is a case in which the plaintiffs would be entitled to probate as executors by implication. The duties which the plaintiffs are directed to perform are not specifically the duties of an executor. It is not the administration of the estate which they are told to carry out. But rather it is as guardians of the child whose adoption is contemplated that they are intended to act. We think, it is quite clear, that there was no intention to vest any property in them. They were only directed to protect the property during the minority. For these reasons, we think that the suit is wrongly brought in the name of the plaintiffs as executors. But as the objection was not taken in the Court of First Instance, and was apparently taken by the Judge himself, we think the suit ought not to have been dismissed without giving the plaintiffs an opportunity to amend. We shall now allow the amendment which, we think, the Judge ought to have allowed and which, if it had been allowed, would have saved the suit from any danger of limitation. The amendment will take the form of substituting the minor son as plaintiff with one of the present plaintiffs as next friends.

The decree of the Judge must be reversed and the appeal remanded for disposal on the merits. Costs will be provided for in the revised decree.

20 M. 469.

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## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

BOYAMMA (*Plaintiff*), *Appellant v.* BALAJEE RAU (*Defendant No.* 9), *Respondent.** [27th September, 1897.]

*Limitation Act—Act XV of* 1877, *Section* 4—*Gazetted holiday—Computation of time.*

In calculating the time allowed by law for the presentation of an appeal to a [470] District Court an appellant is entitled to deduct the last day being a gazetted holiday, although the District Judge held his Court on that day.

APPEAL against the order of E. J. Sewell, Acting District Judge of North Arcot, in miscellaneous appeal No. 11 of 1895, dismissing, as being barred by limitation, an appeal preferred against the order of T. Sami Ayyar, District Munsif of Chittoor, on execution petition No. 129 of 1895.

*Ponnusami Ayyangar* and *Subramania Ayyar*, for appellant.

Respondent was not represented.

### JUDGMENT.

We do not think that the fact that the District Judge held Court on a gazetted holiday is sufficient to disentitle the appellant to regard the day as *dies non* in calculating the time allowed by law for presenting an appeal.

We, therefore, set aside the order of the District Judge refusing to admit the appeal and direct him to now admit it and dispose of it according to law.

Costs will abide and follow the result.

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20 M. 470 (F.B.)=2 Weir 643=7 M.L.J. 303.

## APPELLATE CRIMINAL—FULL BENCH.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Shephard, Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

*In Criminal Revision Case No.* 472 *of* 1896.

GANTAPALLI APPALAMMA *v.* GANTAPALLI YELLAYYA.†

*In Criminal Revision Case No.* 505 *of* 1896.

PERIANAYAGAM *v.* KRISHNA CHETTI.†

[23rd November, 1896 and 23rd February, 20th July and 14th October, 1897.]

*Criminal Procedure Code—Act X of* 1882, *Section* 488—*Maintenance—Adultery.*

Adultery on the part of the husband, not being such adultery as would be punishable under Indian Penal Code, may nevertheless constitute sufficient cause for the wife separating from her husband and enable her to claim maintenance under Criminal Procedure Code, Section 488.

[R., 30 M. 332=5 Cr.L.J. 359=17 M.L.J. 279=2 M.L.T. 166; 3 M.L.T. 269; 9 Cr. L.J. 390=1 Ind. Cas. 801=5 N.L.R. 19 (Cr).]

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* Appeal against Appellate Order No. 8 of 1897.

† Criminal Revision Cases Nos. 472 and 505 of 1896.

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[471] CASES referred for the orders of the High Court under Criminal Procedure Code, Section 488, by the Acting Sessions Judges of Godavari and Tanjore, respectively.

In each of these cases the Magistrate had ordered a husband, under Criminal Procedure Code, Section 488, to make a monthly allowance for the maintenance of his wife who alleged that he was living in adultery. In the one case the adultery was alleged to have been committed with a widow, and in the other case with a concubine who had lived with the husband for many years. The Sessions Judges reported the cases on the ground that the adultery alleged was not within the definition of the offence of adultery in the Indian Penal Code and referred to Criminal Procedure Code, Section 4.

These cases came on for orders before SHEPHARD and BENSON, JJ., when the Court made the following order of reference to Full Bench.

ORDER OF REFERENCE TO FULL BENCH.—As the question involved in these two cases is one of some importance and we do not agree with the decision reported as *Queen-Empress* v. *Mannatha Achari*(1), we resolve to refer for the decision of the Full Bench the following question, *viz.*:—

Whether adultery on the part of the husband, not being such adultery as would justify a conviction under the Indian Penal Code, may nevertheless constitute sufficient cause for the wife separating from her husband and enable her to claim maintenance under the provisions of the Criminal Procedure Code?

These cases coming on for hearing on the above reference before the Full Bench constituted as above.

The parties were not represented.

COLLINS, C. J.—I think it would be wrong to limit the meaning of the word 'adultery' in Section 488, Criminal Procedure Code, to the very limited definition of the word in Section 497 of the Penal Code. Adultery is a crime under that section that can only be committed by a man having sexual intercourse with the wife of another without the consent or connivance of the husband of that wife.

Section 488 of the Criminal Procedure Code provides for the maintenance of the wife and enacts that a Magistrate may make an [472] order for maintenance in favour of the wife, even though the husband offers to maintain his wife on condition of her living with him if the Magistrate is satisfied that the husband is living in adultery. The term adultery is used in that section in the ordinary sense, that is, a married man having sexual connection with a woman who is not his wife. It appears to me that this construction is not affected by the last words of Section 4 of the Criminal Procedure Code, but is consistent with it. It is clear that a different intention appears from the subject or context—see the first part of Section 4.

A difficulty must always arise in deciding in what cases the adultery of the husband is sufficient cause for the wife to claim maintenance. Amongst the Hindu community concubinage is recognised, and it is possible for concubines to have a certain status. If, therefore, a husband keeps a concubine in a house apart from his wife, it is doubtful, whether such an act alone would entitle the wife to separate maintenance, but if he kept such concubine in the same house as his wife lived in and against the wishes, or in such a manner as to offend the self-respect of his wife,

(1) 17 M. 260.

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n my opinion that would entitle the wife to separate maintenance under Section 488, Criminal Procedure Code.

I answer the question referred to the Full Bench in the affirmative.

SHEPHARD, J.—I have nothing to add to the observations already made by me about the applicability of the Penal Code definition of adultery '* The solution of the question what conduct [473] on the part of the husband amounts to 'living in adultery' within the meaning of the Criminal Procedure Code is however not much advanced by the conclusion that the Penal Code definition cannot be applied. The words point to a continuous course of conduct, not to isolated acts of immorality. But conduct of this sort which according to Western notions would be condemned as a breach of the marital obligation is not so condemned either by Hindus or by Muhammadans. No doubt the right of maintenance enforceable under the Procedure Code is a right which exists independently of the personal law of the parties. The provision is analogous to that made by the English Poor Law, under which children who have no common law right to maintenance at their fathers' hands, may claim it from them before a Magistrate (see *Bazeley* v. *Forder* (1)).

The circumstance, however, that the right rests on statute and not personal law, does not, I think, preclude a consideration of the usages of the particular community for the purpose of determining the meaning of the term 'adultery.' I cannot conceive that it was intended to apply the term to conduct considered by the community to which the parties belong as innocent from a matrimonial point of view. Subject to these observations on the general question I am of opinion that the question referred must be answered in the affirmative.

SUBRAMANIA AYYAR, J.—Adultery, according to the Penal Code, is an act of which a man alone can be guilty. It is an offence committed by a third person against a husband in respect of his wife. If, as was held in *Queen-Empress* v. *Mannatha Achari* (2), this limited meaning be adopted in construing the term adultery in Section 488 of the Criminal Procedure Code, it would follow that the husband could not properly be charged with adultery in a maintenance case unless all the conditions of Section 497, Indian Penal Code, are complied with. Such, however, could not possibly have been the intention of the legislature. For, what difference does it make to the wife, whom the husband has neglected or refused to maintain, whether the woman with whom he is living in adultery is a married woman or not and, if the woman be married, whether the woman's husband connives at the adultery or not? So far as the wife

* "I do not think we are compelled to put such an unreasonable interpretation on the language of the Legislature as the Sessions Judge suggests. Adultery, according to the Penal Code, is an act capable of being done by a man only. 'It is an offence committed by a third person against a husband in respect of his wife. 'In the Criminal Procedure Code the term adultery is used in the larger and ordinary 'sense. Either the husband or the wife may be guilty of it. It is with the breach by 'either party of the marriage obligation, not with the offence of a third party, that 'Section 488, Criminal Procedure Code, is concerned. If the Sessions Judge's view 'were correct, it would follow that the husband could not properly be charged with 'adultery in a maintenance case, unless all the conditions of Section 497 of the Penal 'Code, including absence of consent or connivance on the part of the other husband, 'could be established. This is to my mind absurd. Comparing Section 497 of the 'Penal Code and Section 488 of the Criminal Procedure Code, I think we are entitled 'to say that, while in the former adultery of one species only is dealt with, in the latter 'adultery in the sense of a breach by either party of the matrimonial tie was intended. 'I would therefore decline to interfere."

(1) L. R. 3 Q. B. 559.
(2) 17 M. 260.

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is concerned her grievance is all the same. Therefore while in Section 497, Indian Penal Code, adultery of [474] one specific description only is dealt with, it is clear that in Section 488 of the Criminal Procedure Code adultery is used in the wider and ordinary sense of voluntary sexual connection between either of the parties to the marriage and some one, married or single, of the opposite sex other than the offender's own spouse. This construction is not inconsistent with any part of the interpretation clause, Section 4 of the Criminal Procedure Code, referred to in *Queen-Empress* v. *Mannatha Achari* (1). For though the concluding paragraph of that section says that all words and expressions used in the Criminal Procedure Code and defined in the Indian Penal Code, but not defined in the previous part of the Section 4 should be deemed to have the meanings respectively attributed to them by the Penal Code, yet this provision must, in reason, be held to be governed by the qualification laid down in the opening sentence of the section, *viz*: "Unless a different intention appears from the subject or context." Now looking to the context, a different intention cannot but be inferred, considering that the offence of adultery under Section 497 of the Indian Penal Code, as already observed, is one against the husband, whereas under Section 488 of the Criminal Procedure Code, the term includes cases where the wrong done is to the wife. And notwithstanding that the concluding paragraph of Section 4 is separated by a full stop from that part of the section which contains the qualifying words "Unless, &c., &c," it is difficult to believe that the framers of the section intended that that paragraph was not to be taken subject to the qualification specified in the beginning of the section. To the extent stated above, therefore, the conclusion arrived at in *Queen-Empress* v. *Mannatha Achari* (1) cannot be supported. But it should not be understood that the ruling in Criminal Revision Case No. 547 of 1884* referred to and relied on by Muttusami Ayyar, J., in that case is dissented from. In determining, in cases like the present, whether the cause shewn by the wife for refusing to live with her husband is good and reasonable, it is but just that the Magistrate should take into consideration [475] the social habits of the particular community to which the parties belong. If that community (as is the case with Hindus) does not completely disapprove of concubinage and tolerates it so far as to give kept women some status and rights (*Yashvant Rav* v. *Kashibai* (2)), the fact that the husband keeps a concubine ought not by itself entitle the wife to claim separate maintenance. The question in each case will be whether the conduct of the husband is such as the wife consistently with self-respect and due regard to her position as wife, can live in the house of the husband. If this is possible and the husband is willing to receive her, the Magistrate may refuse to order separate maintenance. I concur therefore in answering the question in the affirmative.

Benson, J.—I have no doubt but that the question proposed must be answered in the affirmative. The concluding words, no doubt, of Section 4 of the Criminal Procedure Code enact that any word used

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"Turner, C.J.—"It has been held that concubinage is so far recognized by "persons who are by religion Hindus, that the circumstance that the husband keeps "a concubine in the house will not entitle a wife to an allowance for maintenance if "her husband is willing to receive her and treat her with the consideration which is "due to her position. The order of the Magistrate must be set aside and he is directed "to pass fresh orders." (=2 Weir 641.)

(1) 17 M. 260. (2) 12 B. 26.

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but not defined in that Code shall be deemed to have the meaning attributed to it in the Indian Penal Code, but this provision is subject to the opening words of Section 4, which say "unless a different intention "appears from the subject and context." This limitation seems to have been overlooked by the learned Judges who decided the case of *Queen-Empress* v. *Mannatha Achari* (1).

In the present case "the subject and context" show that "adultery" in Section 488, Criminal Procedure Code, has a much wider significance than adultery as defined in Section 497, Indian Penal Code. In the Indian Penal Code it is an offence committed by a man against another man in respect of the wife of the latter. It is an offence which cannot be committed by a woman; but the Criminal Procedure Code expressly contemplates adultery by a woman. For this reason, if for no other, it is impossible to say that 'adultery' in Section 488, Criminal Procedure Code, has the limited meaning attributed to it in Section 497, Indian Penal Code.

Again 'adultery' under the Indian Penal Code is not committed by a man who has sexual intercourse with an unmarried woman, or with a widow, or even with a married woman, whose husband consents to it, but such considerations cannot, in reason, be held to make any difference in the 'adultery' contemplated by the [476] Criminal Procedure Code. The 'adultery' there contemplated is, I think, adultery in the popular sense of the term, *viz.*:—a breach of the matrimonial tie by either party.

I would not, however, be understood to imply that a Magistrate ought, as a matter of course, to decree maintenance for a wife who refuses to live with her husband, solely because he has been guilty of an isolated act or acts of adultery or even because he keeps a concubine. The words, "living in adultery" imply a course of action more or less continuous. Moreover, a discretion is vested in the Magistrate. He 'may' not he 'shall,' make an order, &c. He has, then, a discretion to consider and be guided by the social ideas and feelings of the community to which the parties belong. Concubinage is, within certain limits, recognized, both by Hindu and Muhammadan Law, and is not in all circumstances reprobated by the public opinion of those communities. It follows that the keeping of a concubine is not, necessarily and in all circumstances, to be regarded by the Magistrate as a sufficient reason for a woman refusing to live with her husband, though it is equally clear that a Magistrate may in certain circumstances regard it as a sufficient reason, and award separate maintenance to the wife. The Magistrate must be guided by all the facts and circumstances of each case and with due regard to the social ideas and customs of the community to which the parties belong. With these remarks, I would answer the reference in the affirmative.

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(1) 17 M. 260.

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## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.*

KUMARA AKKAPPA NAYANIM BAHADUR (*Defendant*), *Appellant v.* SITHALA NAIDU (*Plaintiff*), *Respondent.** [21st and 22nd April and 10th August, 1897.]

*Limitation Act—Act XV of* 1877, *Sections* 6, 12—*Rent Recovery Act—Act VIII of* 1865 (*Madras*), *Sections* 18, 69—*Deduction of time occupied in obtaining copy of judgment appealed against.*

A tenant whose property had been distrained for arrears of rent sued under Rent Recovery Act, Section 18, by way of appeal against the distraint. The Revenue [477] Court decided in his favour. The landlord preferred an appeal under Section 69 more than 30 days after the date when the decision was pronounced. He claimed that the time occupied in procuring a copy of the judgment appealed against should be deducted in the computation of the 30 days' period of limitation.

*Held*, that the appellant was not entitled to have the deduction made, and that the appeal was barred by limitation.

[R., 22 M. 179 = 8 M.L.J. 265 ; 34 M. 505 (509) = 5 Ind. Cas. 884 = 20 M.L.J. 283 = 7 M. L.T. 132.]

SECOND appeal against the decree of E. J. Sewell, Acting District Judge of North Arcot, in appeal suit No. 320 of 1895, affirming the decree of R. F. Grimley, Head Assistant Collector of North Arcot, in summary suit No. 672 of 1894.

The plaintiff was a tenant of the Raja of Kalahasti, who had distrained moveable property of the plaintiff for arrears of rent due by him. This was a summary suit brought by him before the Head Assistant Collector by way of appeal against the distraint. On the 10th April 1895 the Head Assistant Collector pronounced judgment in favour of the plaintiff. The defendant appealed to the District Judge under Section 69 of the Act, the appeal being filed on the 14th May. In bar of the 30 days' rule of limitation the appellant claimed that the time occupied in obtaining a copy of the judgment appealed against should be deducted. The District Judge held that the appellant was not entitled to have this deduction made and dismissed the suit as being barred by limitation.

Defendant preferred the second appeal.

Mr. *Stephen*, *Andy* and *Sundara Ayyar*, for appellant.

*Mahadeva Ayyar*, for respondent.

## JUDGMENT.

COLLINS, C.J.—The appeal to the Lower Appellate Court was filed under Section 69 of Act VIII of 1865, and it was objected that the appeal was out of time, having been presented more than 30 days after the date of the Collector's judgment. It was contended by the appellant that the time taken in obtaining copies of the judgment must be deducted and if that was done the appeal would be within time. The question to be decided is—does Section 12 of the Limitation Act apply to an appeal filed under Section 69 of Act VIII of 1865, the Rent Recovery Act. Section 69 enacts that a regular appeal shall lie to the Zillah Judge from all judgments

* Second Appeal No. 1104 of 1896.

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passed by a Collector under this Act, provided that the appeal be presented within 30 days from the date of the Collector's judgment. It may be here noticed that the section does not require the appellant when filing the appeal to file therewith a copy of the decree or judgment appealed against.

[478] Section 12 of the Limitation Act is to the effect that, in computing the period of limitation prescribed for an appeal, the time requisite for obtaining a copy of the decree and judgment shall be excluded. This provision can only be held to apply, where it is necessary to file with such appeal a copy of the decree or judgment. It appears to me, however, that the point has been decided. *Syed Mohidin Hussen Saheb, in re* (1), *Krishnasami Muppanar* v. *Sankara Row Peshvir* (2) and *Sri Raja Gopala Krishna* v. *Ramireddi* (3) are authorities in favour of the argument that Section 12 of the Limitation Act does not control the time fixed for appealing by Section 69 of Act VIII of 1865. See also *Veeramma* v. *Abbiah* (4).

Another argument might also be used that the Rent Recovery Act is an Act complete in itself and therefore Section 12 of the Limitation Act does not apply (*Nagendro Nath Mullick* v. *Mathura Mohun Parhi* (5) and *Veeramma* v. *Abbiah* (4)). This appeal must be dismissed with costs.

SHEPHARD, J.—The question to be decided is whether the provisions of Section 12 of the Limitation Act are applicable to an appeal filed under the provisions of Section 69 of Act VIII of 1865. The suit, in this case, was a summary suit filed, under Section 18 of the latter Act, by the tenant who sought to have certain property released from distraint. The District Judge held that the appeal petition having been presented more than 30 days after the date of the judgment, could not be entertained, because under Section 69 of the same Act any appeal from the judgment passed by the Collector, under the Act must be presented within 30 days from the date of the Collector's judgment. As far as the decisions in this Court are concerned, there can be no doubt that the District Judge is right. In two cases the question now raised was decided with reference to the Limitation Act of 1871 (*Syed Mohidin Hussen Saheb, in re* (1), *Krishnasami Muppanar* v. *Sankara Row Peshvir* (2)). In the latter of these cases it was decided that an appellant proceeding under the Rent Act was not entitled to any enlargement of the period of the 30 days laid down by Section 69. These cases have been followed in a recent case *Sri Raja Gopala Krishna* v. *Ramireddi* (3). It is now contended that [479] the law laid down in the eariler cases has since the passing of the Limitation Act of 1877, ceased to be in force and reference is particularly made to the alteration of the language of Section 6 of the present Act as compared with the Section 6 of the Act of 1871. In *Syed Mohidin Saheb, in re* (1) it is pointed out that there is no provision in the Rent Act similar to that in the Civil Procedure Code requiring the appellant to produce, with the petition of appeal, a copy of the decree appealed against. This being so, I think, it follows that Section 12 of the Limitation Act can have no application. This was the view taken in the Full Bench case in Allahabad, *Fuzal Mahammad* v. *Phul Kuar* (6), where an appeal under Clause 10 of the Letters Patent was in question.

Another ground on which the judgment of the District Judge may be supported is that Act VIII of 1865 is an enactment dealing with a special

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(1) 8 M. H.C.R. 44. (2) M.L R. 271. (3) S.A. No. 1250 of 1895 (unreported).
(4) 18 M 99. (5) 18 C. 368. (6) 2 A. 192.

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subject and intended, so far as the provisions of the Act go, to be a complete body of law. The Act is entitled an Act to consolidate and improve the laws which define the process to be taken for the recovery of rent. Under it, suits may be brought by either landlord or tenant to decide disputes regarding arrears of rent and other questions arising between them; for such summary suits, Section 51 provides that they must be brought within 30 days from the date of the cause of action. Section 40 provides for the case of a summary suit by a tenant against whom the landlord has threatened sale for arrears of rent. Such suit is to be brought within one month from the date of service of notice on the defaulter. Section 69 already cited contains a general provision for the case of an appeal to the Zillah Judge from the judgment passed by the Collector under the Act. Section 78 provides for the case of an action to recover money paid or damages with respect to anything done under the authority of the Act and requires that any such action in the Civil Court must be brought within six months from the time when the cause of action arose. It appears to me that the observations made in the case of *Unnoda Persaud Mookerjee* v. *Kristo Coomar Moitro* (1) apply to this enactment. There the Judicial Committee was dealing with the Limitation Act (Act XIV of 1859) in connection with the Bengal Rent Act X of 1859. The Judicial Committee considered that the appeal under the latter Act was governed by the provisions of that Act and not **[480]** by those of the general law. They regarded Act X of 1859 as forming a special and complete act of procedure with regard to the trial of questions relating to rent and the occupancy of land in the mofussil and by which all the proceedings before the Collector were regulated and governed. In conformity with this decision the Full Bench of the Calcutta High Court has held that the provisions of Section 14 of the Limitation Act cannot be taken advantage of by a plaintiff proceeding against his tenant under Act X of 1859 (*Nagendro Nath Mullick* v. *Mathura Mohun Parhi* (2)). Section 14 like Section 12 appears in Part III of the Act under the heading "Computation of Period of Limitation" and as far as the present question is concerned no distinction can be drawn between the language of the two sections.

With regard to the argument founded on Section 6 of the Act of 1877, I adhere to the opinion expressed by me in *Veeramma* v. *Abbiah* (3). Here we are in effect asked to read instead of the words "from the date of the Collector's judgment" in Section 69 the words "from the date when the copy of that judgment should be obtained." I cannot see how it can be said that the period of 30 days prescribed by the special law enacted in Act VIII of 1865 would not be effected by reading into Section 69, the provisions of Section 12 of the Limitation Act. It does not appear to me correct to say that the Legislature has reverted to the language of Act XIV of 1859. For it is one thing to say as is said in Section 3 of that Act that the shorter period of limitation specially prescribed for any class of suits shall be applied notwithstanding that Act. It is another thing to say as is said in the Act of 1877 that the period of limitation specially prescribed by an existing enactment shall not be affected or altered by any provision of the Act of 1877. For these reasons, I think, the second appeal ought to be dismissed with costs.

(1) 15 B.L.R. 60. (2) 18 C. 368. (3) 18 M. 99.

20 M. 481=7 M.L.J. 263.

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## [481] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

KAMALAMMAL (*Plaintiff No.* 1), *Appellant v.* PEERU MEERA LEVVAI ROWTHEN (*Defendant*), *Respondent.**
[31st March and 28th April, 1897.]

*Contract Act IX Act—of* 1872, *Section* 73—*Interest—Suit for money payable under an oral contract.*

The plaintiff sued to recover a sum of money due to her on an oral contract together with interest. No agreement or usage giving a right to interest was alleged, and no written demand and notice had been given under the Interest Act :

*Held*, that the plaintiff was not entitled to interest.

[**Diss.**, 26 C. 955 ; **F.**, 19 P.L.R, 1902=104 P.R. 1901 ; **R.**, 31 M. 250=18 M.L.J. 245 =3 M.L.T. 278 ; 16 C.L.J. 264=16 Ind. Cas. 246 (249) ; 11 Ind. Cas. 674 (675) =14 O.C. 164 ; 39 P.R. 1913 ; 1 S.L.R. 179 ; 24 T.L.R. 49 ; **Cons.**, 31 B. 354=9 Bom. L.R. 439.]

SECOND appeal against the decree of T. Ramasami Ayyangar, Subordinate Judge of Madura (West), in appeal suit No. 284 of 1895, modifying the decree of V. Kuppusami Ayyar, District Munsif of Tirumangalam, in original suit No. 415 of 1894.

Plaintiff sued to recover Rs. 1,478 on account of rent due by the defendant to her and interest thereon at 12 per cent. per annum. There was no agreement to pay interest and no notice that interest would be charged. The District Munsif passed a decree as prayed holding that the plaintiff was entitled to interest by way of damages.

The Subordinate Judge modified the decree by disallowing interest. The plaintiff preferred this second appeal.

*Rangachariar*, for appellant.

Mr. *N. Subramanyam*, for respondent.

## JUDGMENT.

The question in this case is whether the first plaintiff, to whom a sum of money was payable under an oral contract, is entitled to interest prior to the date of the suit.

No agreement or usage giving a right to the interest was alleged, and it was admitted that no written demand giving notice that interest would be claimed, was sent under Act XXXII of 1839.

In these circumstances it must be held that the interest cannot be decreed.

**[482]** It will be seen from the judgments delivered in the Court of appeal and in the House of Lords in *London Chatham and Dover Railway Company* v. *South Eastern Railway Company* (1), that in England, at common law, interest was not recoverable as damages in cases similar to the present. That the law of this country must be taken to be substantially the same, was established by the decision of the Judicial Committee in *Juggo Mohun Ghose* v. *Kaisreechund* (2) ; and in *Kesara Rukkumma Rau* v. *Cripati Viyanna Dikshatulu* (3), Scotland, C.J., and Holloway, J., laid down broadly that, in the absence of a demand in writing, interest up to

* Second Appeal No. 267 of 1896.

(1) 1893 App. Cas. 429. (2) 9 M.I.A. 256 (260). (3) 1 M.H.C.R. 369.

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date of suit cannot be awarded upon sums which are not payable under a written instrument and of which payment has been illegally delayed. The learned Judges arrived at that conclusion in spite of the practice, which, they admitted, had for a long series of years prevailed in the mofussil Courts of awarding interest upon all demands improperly withheld—a practice which the learned Judges felt bound to declare was unsupported by authority.

It was, however, contended for the first plaintiff that the law on the point has been otherwise, since the passing of the Contract Act and Section 73 of the Act coupled with illustration (*n*) annexed thereto, was relied on. No doubt, the section applies to, and includes cases of, breach of contract to pay money. But to construe the section as giving a right to interest even in those cases, in which it could not be awarded according to the provisions of Act XXXII of 1839, would be to hold that the latter enactment was virtually repealed by the former. Now this is totally opposed to the maxim *generalia specialibus non derogant.* Referring to this principle, Bovill, C. J., observed in *The Queen* v. *Champaneys* (1) "it is a fundamental rule in the construction of statutes, that a subsequent statute in general terms is not to be construed to repeal a previous particular statute, unless there are express words to indicate that such was the intention, or unless such an intention appears by necessary implication." The reason for the presumption against a repeal by implication in these cases, as stated by Wood, V. C., is "in passing a special Act, the legislature had their attention directed to the special case which the Act was [483] meant to meet, and considered and provided for all the circumstances of that special case; and, having done so, they are not to be considered by a general enactment passed subsequently, and making no mention of any such intention, to have intended to derogate from that which, by their own special Act, they had thus carefully supervised and regulated" (*Fitzgerald* v. *Champneys* (2)). In the present case, Act XXXII of 1839 is not one of the enactments specified in the schedule to the Contract Act as repealed, and there are no express words in Section 73 indicating an intention to rescind the earlier Act. In fact, there is no real conflict between the two, since effect may well be given to Section 73, by holding that the award of interest, as compensation contemplated by that section, has reference to cases in which such award can be made without infringing the provisions of the other Act. Still less can that Act be held to be in any way affected by the illustration relied on; inasmuch as an illustration has not the same operation as the sections which really form the enactment (*Nanak Ram* v. *Mehin Lal* (3), and *Koylash Chunder Ghose* v. *Sonatun Chung Barooie* (4)). Even were it otherwise, it is obvious that the framers of the illustration were not considering under what conditions and limitations interest should be awardable in cases of breach of contract to pay money. They meant only to point out that, if in consequence of a breach of that kind, a man finds himself unable to pay his debts and is ruined; he cannot recover compensation for loss of that remote character; and the allusion to interest was made to show that that was the only legally recoverable compensation for the breach.

The appeal, therefore, fails and is dismissed with costs.

(1) L.R. 6 C.P. 394.
(2) 30 L.J.Ch. 782.
(3) 1 A. 487.
(4) 7 C. 132.

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## [484] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

KRISHNAN NAMBUDRI (*Plaintiff*), *Appellant v.* RAMAN MENON AND OTHERS (*Defendants*), *Respondents.**
[23rd April, 1897.]

*Registration Act—Act III of* 1877, *Section* 17 (*c*)—*Agreement to renew a kanom and to credit as renewal fees a sum of money then due by plaintiff to defendant—Want of registration—Admissibility in evidence.*

*Per cur*; A written agreement to renew a kanom and to credit as renewal fees a sum of money then due is not an acknowledgment of money paid for the creation of an interest in land within the meaning of Section 17 (*c*) of the Registration Act and therefore is admissible in evidence though unregistered:

*Held*, that in such an agreement, the agreement to renew is severable from the rest of the agreement and the document, though unregistered, is admissible in evidence of the agreement to renew even if it were inadmissible for other purposes.

SECOND appeal against the decree of A. Venkataramana Pai, Subordinate Judge of South Malabar, in appeal suit No. 594 of 1895, affirming the decree of K. Govinda Nambiar, District Munsif of Ernad, in original suit No. 112 of 1894.

This was a suit to redeem a kanom of 1869. Defendant No. 1 pleaded that an agreement to renew the said kanom had been executed by the plaintiff in his favour. The agreement, Exhibit II, which was not registered, was as follows:—

"Deed executed by Valia Chembashi Illoth Narayanan Nambudripad, "residing in Ugrapuram deshom, Iruvetti amshom, Ernad taluk, to "Palakkal Raman Menon, residing in Pauniangara amshom, Calicut "taluk.

"The amount due on settlement of accounts in respect of monies previ-"ously received in respect of expenses of suits relating to our illom pro-"perties and the amount borrowed this day in cash from Raman Menon "amount of Rs. 125. I shall repay this sum of Rs. 125 and the interest "due thereon at the usual rate within the 30th Dhanu 1050 and take "back this deed. If I fail to pay off this debt within the period fixed, "at the time of renewal when the term fixed in the renewal deed granted "to Raman Menon for [485] 24 years in respect of Melepurakkat nilam "and others which are our jenm, expires, grant a demise crediting the "principal of Rs. 125 against the amount due to me on account of renewal "fees."

The Lower Courts held that this agreement was proved and dismissed the suit.

The plaintiff preferred this second appeal.

*Sundara Ayyar*, for appellant.

*Ryru Nambiar*, for respondent No. 1.

## JUDGMENT.

We are unable to agree with the appellant's contention that Exhibit II is not admissible in evidence for want of registration. We do not think that it contains an acknowledgment of money paid for the creation of an interest within the meaning of Section 17 (*c*) of the Registration Act. It

* Second Appeal No. 806 of 1896.

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evidences an agreement to renew and to credit as renewal fees a sum of money which had become due by the plaintiff to the defendant at the time the document was executed. The promise so to credit the money was not, in our opinion, an acknowledgment such as is contemplated by the section.

Even if it were such an acknowledgment, the document would still be admissible as evidence of the agreement to renew, a part of the document which in our opinion is severable from the part which is alleged to amount to an acknowledgment.

It is further argued that even if there was an agreement to renew it was not valid, because the amount of the renewal fees was not fixed.

As to this, we observe that, though the language of the instrument is not very clear, we are unable to say that it is inconsistent with the contention that the renewal fee was to be the sum stated in the document, *viz.*, Rs. 125 with interest. If the appellant's present contention were well founded, it would probably have been raised in the Courts below, but we find that it was not, in fact, raised in either Court.

The second appeal therefore fails and we dismiss it with costs.

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**20 M. 486=7 M.L.J. 198.**

## [486] APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.*

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PURNAMAL CHUND (*Defendant No.* 3), *Appellant v.* VENKATA SUBBARAYALU (*Plaintiff*), *Respondent.** [28th January and 9th and 19th February, 1897.]

*Mortgage—Priority—Merger of former mortgage in decree—Right of subsequent mortgagee to keep the prior incumbrance alive.*

Where there is a subsisting prior incumbrance and a subsequent mortgagee advances money for the purpose of discharging it, but it is for his benefit still to keep it alive, his right to keep it alive is not affected by the fact that the prior incumbrance had at the time taken the form of a decree. *Adams* v. *Angell* (1) followed.

[F., 2 C.L.J. 202; R., 35 M. 642 (647)=11 Ind. Cas. 865=21 M.L.J. 811=10 M.L.T. 169=(1912) M.W.N. 24 (28); 12 C.P.L.R. 70; Not Appr., 7 A.L.J. 984=7 Ind. Cas. 468 (469).]

SECOND appeal against the decree of S. Russell, District Judge of Chingleput, in appeal suit No. 62 of 1894, affirming the decree of N. Sarvothama Rau, District Munsif of Poonamallee, in original suit No. 230 of 1892.

The facts of this case appear sufficiently for the purpose of this report in the judgment of the High Court.

*Sankaran Nayar*, for appellant.

*Ramachandra Rau Sahib*, for respondent.

## JUDGMENT.

The respondent (plaintiff) seeks to enforce a mortgage executed in his favour on the 15th December 1891. The sum of Rs. 1,150, part of the sum advanced by him was, it is found, advanced and actually for the

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* Second Appeal No. 1427 of 1895.

(1) L.R. 5 Ch. D. 645.

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amount due under a decree, dated the 20th March 1890, obtained by one Subba Reddi on a mortgage in his favour executed in the year 1887. The appellant was the holder of an intermediate incumbrance, dated the 4th February 1890, upon which also a decree was obtained on the 4th November 1890. Prior to the date of the respondent's mortgage, there were therefore two mortgage decrees in existence, the earlier one in favour of Subba Reddi, the later in favour of the appellant. It is found, as a fact, that the respondent when advancing Rs. 1,150 for the discharge of the earlier decree intended to keep alive the prior incumbrance, and it has been [487] held that he is to that extent entitled to priority as against the appellant whose incumbrance is intermediate in point of time.

On the hearing of the appeal, it was argued before us that inasmuch as Subba Reddi's mortgage had become merged in the decree passed upon it and that decree had been satisfied, the intention of keeping it alive for his own benefit could not properly be imputed to the respondent. Notwithstanding the opinion to the contrary expressed in the unreported case, we are of opinion that the principle on which the respondent bases his claim to priority is not affected by the circumstance that the money advanced by him was advanced in order to pay off a mortgage-debt due under a decree. It is sufficient for the respondent to show that there was a subsisting prior incumbrance; that his money was lent for the purpose of discharging it, and that it was for his benefit that that prior incumbrance should still be kept alive. It cannot be said that he had any the less a right to keep the incumbrance alive, because it had taken the form of a decree. The same thing had happened in the case of *Adams* v. *Angell* (1), nor can it be said in the present case that the respondent did anything which could serve to negative an intention on his part to adopt the course which it was obviously for his benefit to adopt. The appeal is dismissed with costs.

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**20 M. 487.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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MAMMOD (*Judgment-debtor*) *Appellant* v. LOCKE AND ANOTHER (*Decree-holder and Auction-purchaser*). *Respondents.**

[6th August and 2nd September, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Section* 244(c)—*Parties to the suit—Auction-purchaser.*

Land was sold in execution of a decree of a Subordinate Court, and a sale certificate was issued. A question having subsequently arisen as to what had actually been the subject of the sale, the auction-purchaser applied to the Court, and an order was made by which the sale certificate was amended. The judgment-debtor appealed to the District Court joining the decree-holder and the auction-purchaser as respondents.

[488] The appeal was dismissed on the ground that no appeal lay:

*Held*, that the question was not one which could be determined under Civil Procedure Code, Section 244, and consequently the decision of the Lower Appellate Court was right.

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* Appeal against Appellate Order No. 22 of 1897.

(1) L. R. 5 Ch. D. 645.

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[F., 24 A. 519=(1902) A.W.N. 144 ; R., 25 B. 418 ; 30 M. 507=17 M.L.J. 291 ; 34 M 417 (421)=3 Ind. Cas. 429 ; 8 Ind. Cas. 429=21 M.L.J. 928 (933) ; 45 P.R. 1904=113 P.L R. 1904.]

APPEAL against the order of H. H. O'Farrell, District Judge of South Malabar, in civil miscellaneous appeal No. 65 of 1896, affirming the order of M. Srinivasa Rau, Subordinate Judge of Cochin, dated 3rd August 1896, and made on miscellaneous petition No. 332 of 1896 in the matter of the execution of the decree in original suit No. 9 of 1895.

The facts of the case, as stated by the District Judge, were as follows :—

The municipality of Cochin lent a certain sum of money to one Kunhi to tile his house, and the latter, as security, hypothecated to the municipality the house and the paramba on which it stood. On his death defendants Nos. 1 to 4 were sued as his representatives on the hypothecation bond, and a decree was passed, which, it is said by oversight, made liable the paramba only without mention of the buildings. The paramba was brought to sale and purchased for Rs. 1,500.

The sale proclamation and the sale certificate followed the terms of the decree and made no mention of the buildings. Afterwards the auction-purchaser applied to the Court to amend the sale certificate on the ground that what was really sold was the building as well as the paramba, and the Subordinate Judge, with the consent of all parties except the present appellant (first defendant) and after taking evidence, was satisfied that what was really put up for sale and purchased, was the building as well as the paramba and amended the sale certificate accordingly. Against this order the first defendant appeals, and has made not only the plaintiff—the municipality—but the auction-purchaser a party to the appeal.

The District Judge held that the dispute was not one to which Section 244 was applicable, and consequently that no appeal lay against the order of the Subordinate Judge, although the first defendant might obtain a remedy by an application for revision, and he accordingly dismissed the appeal.

The judgment-debtor preferred this appeal making the decree-holder and the auction-purchaser again parties.

*Sundara Ayyar*, for appellant.

*Subramania Sastri*, for respondents.

## JUDGMENT.

**[489]** Certain immoveable property was sold by the Subordinate Court of Cochin in execution of a decree obtained by the Cochin Municipal Commissioners against the appellant upon a mortgage instrument executed by him. The sale was confirmed. But before the certificate of sale was issued, disputes arose as to whether certain buildings should be included in the certificate as part of the property sold. After hearing the auction-purchaser, the judgment-creditor and the judgment-debtor, the Subordinate Court passed an order directing that the buildings should be included in the certificate. The appellant preferred an appeal against the order to the District Court. The appeal, however, was rejected on the ground that no such appeal lay. On behalf of the appellant it was contended that the view taken by the District Court was wrong, inasmuch as the question in dispute was one which fell under Section 244 of the Code of Civil Procedure.

This contention is, in our opinion, untenable. Now, if the dispute involved the question of the validity of the sale, the case would, no doubt, be

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governed by the ruling of the Judicial Committee in *Prosunno Coomar Sanyal* v. *Kali Das Sanyal* (1). But the sale was not, and could not have been, impeached by any of the parties at the time when the order in question was passed. The dispute was, and is, as to whether, under the sale, the right to the land mentioned in the sale certificate alone passed to the auction-purchaser as the appellant contends or whether, as the purchaser contends, the right to the buildings also passed. If the former contention be upheld, the party that would be affected thereby would be the purchaser. If, on the other hand, the latter contention prevailed, it is the appellant that would suffer by such decision. In neither case, the sale itself being valid, would the judgment-creditor's rights be in any way touched. There is, therefore, in this case no question in dispute between the judgment-debtor on the one side and the judgment-creditor on the other, as urged for the appellant. The question in dispute is really one between the judgment-debtor and the purchaser only. Section 244 of the Code does not, therefore, apply, and the conclusion of the District Court is right.

The appeal is dismissed with costs.

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**20 M. 490.**

## [490] APPELLATE CIVIL.

*Before Mr. Justice Davies and Mr. Justice Boddam.*

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SUBBARAYA CHETTI AND ANOTHER (*Defendants Nos.* 4 *and* 5), *Appellants v.* SADASIVA CHETTI AND OTHERS (*Defendants Nos.* 1, 2, 3, 6, 7, 8, 9, *and* 10), *Respondents.** [18th and 19th February, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Sections* 525—*Date from which partition operates – Partition—Arbitration—Suit to enforce the award with an alternative claim for partition—Whether such suit maintainable.*

Disputes between the members of a Hindu family were referred to arbitrators who made an award as to how the whole of the property should be divided. In pursuance of the award part of the moveable property was divided. Subsequently one of the members of the family died The plaintiff, another member of the family, now sued to enforce the award or in the alternative for partition :

*Held*, (1) that the alternative claim for partition was barred by the award ;

(2) that the provisions of Civil Procedure Code, Section 525, did not preclude the plaintiff from suing to enforce the award;

(3) that the partition should be considered to have taken effect from the date of the award and consequently that the share allotted to the deceased member of the family passed to his heir.

[R., U.B.R. (1906) Specific Relief, 30; D., 19 P.R. 1907 = 46 P.L.R. 1907 = 134 P.W.R. 1907.]

APPEAL against the decree of E. J. Sewell, District Judge of North Arcot, in original suit No. 8 of 1895.

The facts of this case were as follows :—The plaintiff's father, Abbu Chetti, fourth defendant, seventh defendant, Vasantaraya Chetti, father of defendants Nos. 1, 2 and 3, eighth defendant's father-in law and ninth defendant's late husband Cundasami Chetti were brothers. Tenth defendant was the widow of the first defendant's younger brother Ramasami Chetti. Cundasami Chetti adopted fifteen years before his death

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* Appeal No. 98 of 1896.
(1) 19 I.A. 166.

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Sabapathi Chetti, elder brother of plaintiff and the son of Abbu Chetti; eighth defendant was the widow of the Sabapathi Chetti. Sabapathi Chetti and Cundasami Chetti died without male issue. All the above persons lived together until 23rd May 1892. Misunderstandings arose and they asked certain mediators to divide and give them their shares in the whole estate. The mediators arranged (Exhibit A) that the properties should be divided thus: one and three-fourths shares **[491]** to defendants Nos. 1, 2 and 3, one share to Sabapathi, one share to Abbu Chetti, plaintiff's father, one share to fourth defendant and one share to seventh defendant. Accordingly some of the moveable property was divided, but owing to some of the defendants raising objections, the mediators could not effect a division of all the properties. "Plaintiff in this suit" said the Judge "claims a division being made of the property "as above with this variation that as Sabapathi Chetti died since the "award, his share should go to eighth defendant and ninth defendant. "Tenth defendant was made a party, as she was in possession of some of "the family property."

The defendants Nos. 1 to 3 and 7 to 9 did not contest plaintiff's claim, and the District Judge found that defendants Nos. 4 and 5 had agreed to the division fixed by the arbitrators, and had themselves taken some of the property and allowed the other brothers to take some of the rest. He accordingly held that they could not now repudiate the award and passed a decree that the family property be divided and that $\frac{4}{23}$ rds of it delivered to the plaintiff, and that the actual partition be, by consent, made by a commissioner in execution, who was to ascertain the value of the whole property, and of the amount plaintiff has received and then to divide the property so as to award plaintiff $\frac{4}{23}$ rds of the whole.

Defendants Nos. 4 and 5 preferred this appeal.

*Seshagiri Ayyar*, for appellants.

*Subramania Ayyār*, for respondents Nos. 1, 2 and 8.

*Sivagnana Mudaliar*, for respondent No. 4.

*Kothandarama Ayyar*, for respondents Nos. 5 and 6.

## JUDGMENT.

The first question is what is this suit. Is it a suit to enforce an award or for a partition of family property or on a contract to accept the shares settled by arbitrators? The Judge has treated it as a suit on a contract to accept the shares settled by arbitrators, but we are unable to see that this is what was alleged or claimed by the plaintiff. We think the suit is a suit to enforce an award with an alternative claim for partition of family property.

There having been an award, it is clear that the alternative claim for partition cannot succeed. See *Krishna Panda* v. *Balaram Panda* (1) with which we agree.

**[492]** It was argued before us that the suit to enforce the award will not lie, as the proper and only course open to the plaintiff was to proceed under the Civil Procedure Code, Section 525. Having regard, however, to the decision in *Gopi Reddi* v. *Mahanandi Reddi* (2) and the apparent consensus of opinion in this Court from the time of *Palaniappa Chetti* v. *Rayappa Chetti*(3) down to *Husananna* v. *Linganna*(4), we think that the procedure directed by the Civil Procedure Code does not preclude an

(1) 19 M. 290. (2) 15 M. 99. (3) 4 M.H.C.R. 119. (4) 18 M. 423

action being brought to enforce an award. We, therefore, hold that the plaintiff is entitled to succeed as to this. 1897 FEB. 19.

There is no doubt that an award was given (Exhibit A). It was argued that it was an incomplete award, and could not be enforced. We think, however, that the award is complete in itself. But it is said that only a declaratory decree can be given upon it, and that the decree of the Judge directing a partition went beyond the award. The parties, however, agreed at the settlement of issues that, when the shares were determined, the actual partition of the family property should be made by a commissioner in execution and this is all that the Judge has decreed. We do not see that there is anything illegal in this. APPELLATE CIVIL. 20 M. 490.

Then an objection is taken that it has not been settled in the suit or by the arbitrators what the family property is which the commissioner is to divide. All we can say is that no question as to this was raised in the Lower Court, and we must assume that any dispute there may have been was waived, and that the property mentioned in the plaint is the property to be divided.

Finally, the question arises when the partition is to be considered as taking effect—on the date of the award or on the date of the Lower Court's decree, because in the former case, the share of one Sabapathi Chetti would go to his heirs, instead of to the coparceners as the appellant's claim. We are, however, of opinion that the award (Exhibit A) followed up as it was immediately, by an actual division of some of the moveable properties, effected a division at that time so that the share allotted to Sabapathi, now deceased, passes to his heirs.

We must support the decree of the Court below and dismiss the appeal with costs (two sets—plaintiff and defendants Nos. 1 to 3).

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**20 M. 493=7 M.L.J. 204.**

## [493] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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VENKATARAMAYYA AND ANOTHER (*Plaintiffs*), *Appellants v.* VENKATALAKSHMAMMA (*Defendant*), *Respondent.**
[29th March, 1897.]

*Limitation Act—Act XV of* 1877, *Schedule II, Article* 141—*Suit by reversioner on the death of female heir—Adverse possession—Hindu law—Law of succession.*

A Hindu died in 1880, leaving him surviving (1) a daughter who died in 1886, who was the grandmother of one of the plaintiffs, and (2) the son of a predeceased daughter who was another plaintiff, and (3) the widow of a predeceased son who was the defendant. The plaintiffs now sued in 1893 to recover possession of his land, of which the defendant had been in possession since his death :

*Held*, that the suit was not barred by limitation and that the plaintiffs were entitled to a decree.

SECOND appeal against the decree of W. G. Underwood, District Judge of Cuddapah, in appeal suit No. 20 of 1895, reversing the decree of P. Sambayya, District Munsif of Madanapalle, in original suit No. 613 of 1893.

Suit to recover land, formerly the property of Appajappa, who died in 1880, leaving him surviving (1) Subbammal, his daughter, who died in

* Second Appeal No. 275 of 1896.

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1886, leaving her son Subbarayudu since deceased, the father of the second plaintiff, and (2) Venkataramayya, the first plaintiff, his grandson, being the son of a daughter who predeceased him, and (3) Venkatalakshmamma, the defendant, his daughter-in-law, being the widow of his son who predeceased him. The defendant entered into possession on the death of Appajappa and she now pleaded that the suit was barred by limitation.

The District Munsif overruled this plea and held that the plaintiffs were entitled to recover and he passed a decree accordingly.

The District Judge reversed his decree on appeal on the ground that the suit was barred by limitation.

Plaintiffs preferred this second appeal.

*Ramachandra Rau Saheb*, for appellants.

*Mahadeva Ayyar* and *Ramachandra Rau*, for respondents.

## JUDGMENT.

The District Judge while stating the law correctly has failed to properly apply it.

**[494]** The last male owner died in 1880, and the defendant at once took possession of the property. The last male owner's daughter, who was the party entitled to possession, died in 1886. The present suit by the reversioners to recover possession was filed in 1893. Under Article 141, Schedule 2 of the Indian Limitation Act (XV of 1877), the reversioners had 12 years from the date of the daughter's death and their suit was therefore clearly in time (*Srinath Kur* v. *Prosunno Kumar Ghose* (1). *Sham Lall Mitra* v. *Amarendro Nath Bose* (2), *Cursandas Govindji* v. *Vundravandas Purshotam* (3), *Mukta* v. *Dada* (4), *Tai* v. *Ladu* (5) *Ram Kali* v. *Kedar Nath* (6)). The respondent relies on the Privy Council case reported as *Lachhan Kunwar* v. *Manorath Ram* (7). If that case was a decision with reference to Article 141, Schedule 2 of the present Act (XV of 1877), or the corresponding Article of Act IX of 1871, it would be in point, but there is nothing to show that it is so, and the dates in the recital of facts lead us to the conclusion that the rights of the reversioners in that suit had become barred under Act XIV of 1859 before the provisions of Act IX of 1871 came into force.

We must, therefore, reverse the decree of the District Judge and restore the decree of the District Munsif. The appellants must have their costs in this and in the Lower Appellate Court.

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(1) 9 C. 934. (2) 23 C. 460. (3) 14 B. 482. (4) 18 B. 216.
(5) 20 B. 801. (6) 14 A. 156. (7) 22 C. 445.

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APPEL-
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CIVIL.

20 M. 494=
7 M.L.J. 201.

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APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

SUBBARAYAR AND OTHERS (*Plaintiffs Nos.* 1, 2, 3 *and* 5), *Appellants v.* ASIRVATHA UPADESAYYAR AND ANOTHER (*Defendants Nos.* 1 *and* 2), *Respondents.**
[31st March, 1897.]

*Revenue Recovery Act—Act II of* 1864 (*Madras*), *Section* 38—*Sale for arrears of revenue—Benami-purchase.*

The purchaser at a sale held for arrears of revenue sued for possession of the land. It was pleaded that his purchase was made *benami* for the persons from whom the defendant derived title :

[495] *Held*, that Revenue Recovery Act, Section 38, did not debar the defendant from raising this plea, and that the averments on which it was based having been proved, the suit should be dismissed.

[**F.**, 28 M. 526=15 M.L.J. 419; 29 M. 473 (F.B.)=16 M.L.J. 505=1 M.L.T. 234; **R.**, 34 M. 143 (148)=7 Ind. Cas. 60 (63)=8 M.L.T. 154; **Expl.**, 25 M. 655.]

SECOND appeal against the decree of S. Gopalachariar, Subordinate Judge of Tinnevelly, in appeal suit No. 48 of 1894, affirming the decree of V. K. Desikachariar, District Munsif of Tuticorin, in original suit No. 425 of 1891.

Suit to recover possession of certain land with mesne profits. The land in question had been sold under Revenue Recovery Act for arrears of revenue due by the landholder and had been purchased by the father, since deceased, of the plaintiff on 28th October 1879.

Possession had never been obtained by the purchaser, and it was pleaded that the purchase had been made benami for the vendors of defendant No. 1.

The District Munsif held that it was open to the defendant to raise this plea, and that it was proved, and that defendant No. 1 and his vendors had been in adverse possession for over 12 years. He accordingly dismissed the suit.

The Subordinate Judge, on appeal, held that the suit was not barred by limitation, but affirmed the decree on the other ground on which the District Munsif based his judgment.

Plaintiff preferred this second appeal.

*Krishnasami Ayyar*, for appellants.

*Sivasami Ayyar*, for respondent No. 1.

## JUDGMENT.

It is contended that, as the plaintiff's father purchased the land at a sale for arrears of revenue, Section 38 of Act II of 1864 (Revenue Recovery Act) precludes the defendants from proving that the purchase was really made by the plaintiff's father not solely on his own behalf but on behalf of the villagers generally. The words of Section 38 are "such sale certi-"ficate shall state the property sold and the name of the purchaser, and "it shall be conclusive evidence of the fact of the purchase in all Courts "and tribunals, where it may be necessary to prove the same, and no "proof of the Collector's seal or signature shall be necessary, unless the

* Second Appeal No. 278 of 1896.

1897 MARCH 31. — APPELLATE CIVIL. — 20 M. 494 = 7 M.L.J. 201.

"authority before whom it is produced shall have reason to doubt its "genuineness."

The intention clearly was to prevent any plea from being raised that the defaulter's interest did not pass by the sale. There is nothing in the language of the section to warrant the contention [496] that the legislature intended thereby to preclude proof being given that the person whose name was entered in the certificate was not the person, or the only person who acquired a right under the purchase.

Where this was intended, the legislature has made a distinct provision to that effect, as in Section 317, Civil Procedure Code.

The evidence objected to was, therefore, rightly admitted, and upon the findings the suit was rightly dismissed. We dismiss this second appeal with costs.

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20 M. 496.

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

KUNHI MARAKKAR HAJI (*Defendant*), *Appellant v.* KUTTI UMMA (*Plaintiff*), *Respondent.** [1st September, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Section* 574—*Contents of appellate judgment —Duty of Appellate Court to examine the correctness of a finding in the absence of a memorandum of objections.*

A Judge having remanded a case for further evidence to be taken and a fresh finding recorded on a question of fact, he is bound to examine the correctness of the finding, and to state in his judgment the reasons for which he either accepts or rejects it.

[F., 22 M. 344; R., 31 M. 469 (F.B.) = 18 M.L.J. 34 = 8 M.L.T. 71; 8 O.C. 290.]

SECOND appeal against the decree of H. H. O'Farrell, District Judge of South Malabar, in appeal suit No. 612 of 1895, modifying the decree of T. V. Anantan Nayar, District Munsif of Kutnad, in original suit No. 120 of 1895.

The plaintiff sued as the divorced wife of the defendant to recover Rs. 105 agreed mahur, and Rs. 28-13-9 the kizhi given to the defendant at the time of their marriage which took place in 1871. The divorce was alleged to have taken place in March 1874, but the defendant denied the divorce and on that ground disputed his liability to repay the kizhi. As to the claim for mahur he pleaded that he had already satisfied it by purchasing land for the plaintiff.

[497] The District Munsif held that neither the divorce alleged by the plaintiff nor the satisfaction of the claim for mahur was established by the evidence, and he passed a decree for Rs. 105 only.

The plaintiff preferred an appeal to the District Court, no memorandum of objections being filed by the defendant.

The District Judge, on appeal, ordered that the evidence of one additional witness named should be taken as to the fact of divorce, and that the defendant should be permitted to adduce evidence to impeach his testimony should he prove hostile. The order prescribed the dates within which the fresh finding should be returned and objections to it taken.

* Second Appeal No. 55 of 1897.

1897 SEP. 1.

APPELLATE CIVIL.

20 M. 496.

The District Munsif complied with this order and recorded a finding that the divorce set up by the plaintiff was true. No memorandum of objections was filed by the defendant with reference to this finding, and on the appeal coming on for hearing again, the District Judge delivered judgment as follows:—

"The Lower Court now finds on further evidence that its former "decision was wrong, and that a divorce as alleged by the plaintiff really "took place. The appeal is allowed and the decree of the Lower Court "modified by directing that plaintiff get a decree as prayed in the plaint "with costs throughout."

The defendant preferred this second appeal on the following grounds:—

"The Lower Appellate Court has failed to record findings on the "issues raised in the case.

"The judgment of the Lower Appellate Court is not in accordance "with the provisions of Section 574 of the Code of Civil Procedure.

"The Lower Appellate Court ought to have given reasons for "allowing the appeal.

"The Lower Appellate Court ought not to have upheld the Munsif's "finding on the first issue.

"The defendant's plea of divorce being inconsistent with the plea "of the payment of dower, he was not entitled to set up that plea."

*Sundara Ayyar*, for appellant.

*Govinda Menon*, for respondent.

## JUDGMENT.

Albeit there may have been no memorandum of objections, it was incumbent on the Judge to examine into the correctness of the finding and come to a conclusion whether he [498] accepted it or not, unless its correctness had been admitted by the party to whom it was adverse, *viz.*, the defendant in this case. There is nothing to show there was such admission, and the Judge has not expressed any opinion on the matter in question. There is therefore no judgment as prescribed by the Code. We must, therefore, reverse the decree and remand the appeal to be disposed of according to law. (See *Umed Ali* v. *Salima Bibi* (1), *Mumtaz Begam* v. *Fateh Husain* (2), *Bhagvan* v. *Kesur Kuverji* (3), and see also *Ramchandra Govind Manik* v. *Sona Sadashiv Sarkhot* (4).) Costs will abide and follow the result.

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20 M. 498.

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

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OLIVER (*Defendant No. 1*), *Appellant v.* ANANTHARAMAYYAR (*Plaintiff*), *Respondent.** [1st and 2nd September, 1897.]

*Rent Recovery Act—Act VIII of* 1865 (*Madras*), *Sections* 18, 39, 40—*Attachment for arrears of rent—Suit to set aside attachment—Subsequent sale.*

A landlord attached his tenant's holding for arrears of rent in 1889, and within the time prescribed by Rent Recovery Act, Section 18, put in an application for sale to the Collector, and otherwise complied with the procedure prescribed

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* Second Appeal No. 89 of 1897.

(1) 6 A. 393. (2) 6 A. 391. (3) 17 B. 428. (4) 19 B. 551.

1897 SEP. 2. — APPELLATE CIVIL. — 20 M. 498.

by the Act. The land was sold, but the sale was set aside as having been irregularly conducted. The landlord then made in 1894 an application to the Collector for a fresh sale (which was granted); a fresh sale took place without a fresh notice being given to the tenant under Section 39 of the intention to sell. The tenant now sued to have this sale set aside:

*Held*, that the plaintiff was not entitled to have the sale set aside.

SECOND appeal against the decree of F. H. Hamnett, District Judge of Tanjore, in Appeal Suit No. 122 of 1896, reversing the decree of N. Sambasiva Ayyar, District Munsif of Tiruvadi, in original suit No. 348 of 1895.

The plaintiff was a tenant on the Tanjore palace estate, of which defendant No. 1 was the receiver. Defendant No. 2 was the purchaser of the lands, which the plaintiff had occupied, at a sale which took place in January 1895.

**[499]** The plaintiff now sued to set aside the sale. It appeared that the receiver had attached the plaintiff's holding for arrears of rent in July 1889. The plaintiff instituted a summary suit to have the attachment raised. This suit terminated in favour of the receiver, who thereupon brought the property to sale in December 1892. The plaintiff then instituted a regular suit to have the sale set aside and succeeded on the sole ground that the sale had not been held on the date originally fixed, but on an adjourned date. The receiver then caused fresh notice of sale to be issued and had the attached property brought to sale. Hence this suit.

The District Munsif was of opinion that the attachment was not cancelled as the result of the previous decree setting aside the sale and held that the sale now in question was a valid sale and he passed a decree dismissing the suit.

The District Judge on appeal reversed his decree and set aside the sale on the ground that the application for the sale had not been made within the period prescribed by Rent Recovery Act of 1865, Section 18. He held that the intermediate proceedings did not operate to extend the time allowed by that section, and he made the following observations:—

"The application for the second sale was only made in 1894 and the "attachment of the property sold is alleged to have taken place in July "1889 The Lower Court considers that there is no limit as to the time "within which application for sale may be made after attachment. In "the view the Lower Court appears to me to be quite wrong. Section 40 "clearly provides that the sale of immoveable property shall be conducted "under the rules laid down for sale of moveable property. One of those "rules is contained in Section 18. There must be an application to the "Collector for an order directing the sale and that application must be "made within the time prescribed in Section 18. There is nothing in "Section 40 which implies that the provisions of Section 18 do not apply "as regards the time within which the application is to be made. The "wording of Act VIII of 1865 is no doubt vague and unscientific, but the "Act must be interpreted reasonably. It is clear that the framers of the "Act, in providing in Section 40 that the sales of immoveable property "'should be conducted under the rules laid down for moveable property' "intended that the same procedure should be adopted in both cases, not "only at the time of sale itself, but also in the preliminary steps **[500]** "to be taken to bring the attached property to sale through the Collector. "It would be monstrous to suppose that the Legislature intended that, "after once issuing a notice under Section 39 of the Act, the landlord "could, years afterwards, have the property sold without the issue of any

"fresh notice, except the general proclamation of the sale prescribed in "Section 18 of the Act."

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APPELLATE CIVIL.

20 M. 498.

Defendant No. 1 preferred this second appeal.

*Pattabhirama Ayyar*, for appellant.

*Sundara Ayyar*, for respondent.

## JUDGMENT.

It is admitted in this case that the first application to the Collector for sale under Section 40 of the Act (VIII of 1865) was made within the time prescribed by Section 18, and that the sale which took place in pursuance of that application was set aside on the ground of an irregularity in the conduct of the sale by the officer carrying it out. After the sale was thus set aside, the landlord applied again to the Collector for a fresh sale without giving a second notice to the tenant of his intention to sell under Section 39. The Lower Appellate Court has held that such notice was necessary, in other words that all that had been done up to the irregular sale was practically void, and that the landlord must begin '*de novo*.' We are unable to accept this view. The landlord was in no way responsible for the irregularity in the sale, and he was entitled to ask the Collector to rectify what had gone wrong by giving orders for a proper sale. The second application to the Collector must be considered in the light of a continuation of the original application for sale, which was admittedly in order. It is contended that a fresh notice of intention to sell ought to be insisted on in the interest of the tenant. But the tenant being the party in default, is entitled to less consideration than the landlord who would necessarily be delayed by the adoption of such a procedure. We must therefore hold that a second notice to the tenant under Section 39 of the Act was not necessary in law before the landlord's application to the Collector for a regular sale in lieu of the invalid one. We accordingly reverse the decree of the District Judge and restore that of the Munsif. The respondent must pay the appellant's costs in this and in the Lower Appellate Court.

21 M. 1=8 M.L.J. 113.

1897 SEP. 10.

APPELLATE CIVIL.

APPELLATE CIVIL.

21 M. 1= 8 M.L.J. 113.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.*

VISVALINGA PILLAI (*Plaintiff*), *Appellant v.* PALANIAPPA CHETTI AND OTHERS (*Defendants Nos.* 1 *to* 3), *Respondents.**
[9th and 10th September, 1897.]

*Transfer of Property Act—Act IV of* 1882, *Sections* 68, 98—*Anomalous mortgage—Right to possession.*

Two out of three co-parceners executed in favour of a creditor in respect of land belonging to the co-parcenary an instrument which contained the following terms: "As we have received Rs. 500. you will, in lieu of the said amount and interest, "enjoy the said property for three years by virtue of Arakattu otti . . . . on the "condition that, on the expiry of the said three years, we should redeem the "land without paying either principal or interest. You will, on the expiry of "the said period, deliver possession of the said immoveable property without "raising any objection." The creditor obtained possession of only part of the land:

*Held*, that the instrument was an anomalous mortgage and that the mortgagee was liable to ejectment after the expiry of the three years.

SECOND appeal against the decree of T. M. Horsfall, District Judge of Tanjore, in appeal suit No. 481 of 1895, affirming the decree of S. Dorasami Ayyar, District Munsif of Tanjore, in original suit No. 521 of 1894.

Suit to recover possession of certain land with arrears of rent. The land in question previously belonged to the family of defendant No. 1, and it was comprised in an instrument therein described as an Arakattu otti deed, dated 27th January 1895, and [2] executed by the father and brother since deceased of defendant No. 1 in favour of defendant No. 2. This instrument was filed in the suit as Exhibit I and was in the following terms:—

"We have mortgaged to you the undermentioned immoveable pro-"perties as described herein below belonging to us and in our enjoyment "and borrowed thereon Company's current Rs. 500, the particulars of the "receipt whereof by us are as follows: for the purpose of paying off Rs. 500 "the decree amount due from one of us, the said Kuppusami Chettiar, "the second defendant in original suit No. 156 of 1882 on the file "of Kumbakonam District Munsif's Court to Muruga Pillai, son of Kup-"paya Pillai, the plaintiff in the said suit residing in Punjukara Street, Pat-"tai, Kumbakonam, we have already received from you Rs. 325 and paid "the same to the said Muruga Pillai; we have received from you on this "date Rs. 175 for discharging the said decree. As we have received Rs. 500 "the total amount of the two items as above, you will, in lieu of the "said amount and its interest, enjoy the said properties for three "years in virtue of Arakattu otti from the current Fasli 1294 to Fasli 1296,

* Second Appeal No. 47 of 1897.

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"yourself paying the Sircar cist, &c. As extensive properties are hereby "mortgaged to you which could yield an income by which you can com- "letely recover the said principal money and its interest within the said "period, and as we have executed this Arakattu otti deed on the condition "that, on the expiry of the said three years' term, we should redeem the "land without paying you either the said principal money or interest, you "will, on the expiry of the said period, deliver possession of the said "immoveable properties without raising any objection. We have herewith "given the copy of the decree in the said suit No. 156. We shall get the "plaintiff in the said suit Muruga Pillai to present a petition in the said "Kumbakonam Munsif's Court to the effect that the decree in the said suit "had been discharged."

The plaintiff subsequently purchased the two-thirds share of the executants of that instrument at a Court-sale held in execution of the decree in original suit No. 214 of 1888 on the file of the District Munsif of Tanjore.

Defendant No. 1 had refused on demand to divide the property. Defendant No. 2 stated that he was in possession of part of the land mortgaged under the above instrument and further that he had no objection to give up possession on being redeemed.

[3] Defendant No. 3 was the widow of the brother of defendant No. 1.

The District Munsif held that the plaintiff's purchase was subject to the rights of defendant No. 2 under Exhibit I, and dismissed the suit on the ground that the plaintiff was not entitled to recover without redeeming which he had not offered to do.

The District Judge on appeal affirmed this decision.

Plaintiff preferred this second appeal.

*Sivasami Ayyar*, for appellant.

*Venkatasubbaramayya*, for respondent No. 2.

## JUDGMENT.

On the whole, though not without hesitation, we think that the instrument may be considered to be a mortgage, but we are of opinion that it falls within Section 98 of the Transfer of Property Act, and that the rights and liabilities of the parties must be determined by the contract itself. The contract does not provide for the contingency which has occurred. No special usage applicable to the present circumstances is set up. It is, however, contented that, under Section 68 of the Transfer of Property Act, it was open to the mortgagee to sue for the mortgage money as possession of part of the mortgaged property had not been delivered to him or to acquire a charge on the part which had been delivered to him until he was repaid the mortgage money. It appears to us, however, that Section 68 does not apply to a case like this. That section contemplates cases where the mortgagee is entitled to claim repayment of the mortgage money before redemption. In the present case, however, the contract gives no right to claim repayment, but in terms denies it. The only right the mortgagee had was to remain in possession for the stipulated period and to recover damages for the breach of contract by the mortgagor in not delivering possession of the whole of the land to him. We think, therefore, that the Lower Courts were wrong in holding that Exhibit I was an usufructuary mortgage and gave the second defendant the right to remain in possession of the part he had after the expiry of the three years agreed upon.

1897 SEP. 10. — APPELLATE CIVIL. — 21 M. 1= 8 M.L.J. 113.

We must, therefore, reverse the decrees in both the Courts below and decree possession of the property sued for to the plaintiff with Rs. 9 for past mesne profits and with future mesne profit also. The defendants must pay the plaintiff's costs throughout.

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**21 M. 4=7 M.L.J. 273.**

## [4] APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

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THE MUNICIPAL COUNCIL, TANJORE (*Defendant*), *Appellant v.* VISVANATHA RAU (*Plaintiff*), *Respondent.** [14th September, 1897.]

*District Municipalities Act—Act IV of* 1884 (*Madras*), *Section* 11—*Interference with a public drain.*

The owner of a house in a street at Tangore renewed without the sanction of the Municipal Council the masonry covering of a drain in front of his house :

*Held*, that the act of the plaintiff did not constitute an interference with the drain within the meaning of District Municipalities Act, Section 211.

[F., 23 B. 248 ; R., 6 Ind. Cas. 431 (436)=6 N.L.R. 53.]

SECOND appeal against the decree of F. H. Hamnett, Acting District Judge of Tanjore, affirming the decree of Syed Tajuddin Saheb, District Munsif of Tanjore, in original suit No. 249 of 1895.

The plaintiff was the owner of a house in Tanjore, in front of which was a Municipal drain. He re-built his house and also the masonry which covered the drain in front of it. The Municipal Council of Tanjore had the covering of the drain removed on the ground that it was constructed without their sanction and was objectionable for sanitary reasons. The plaintiff now sued the Municipal Council for damages, and the main question was, whether the act of the plaintiff constituted an interference with the drain within the meaning of Section 211 of the District Municipalities Act IV of 1884. The District Munsif answered this question in the negative and passed a decree in favour of the plaintiff, which was affirmed on appeal by the District Judge.

The defendant preferred this second appeal.

*Krishnasami Ayyar*, for appellant.

*Pattabhirama Ayyar*, for respondent.

## JUDGMENT.

The fact that Section 212 of the District Municipalities Act refers only to new buildings and not to repairs, is highly significant and clearly indicates that a distinction was intended to be drawn between the two classes of cases.

[5] In the present case there was no erection of any new building over the drain. There was only a repair of the existing covering which had been there for the past 40 years.

We do not think that such repair can be said to be interference with the drain within the meaning of Section 211. The interference referred to in that section is, as the District Judge remarks, interference similar

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* Second Appeal No. 1638 of 1896.

1897 SEP. 14. — APPELLATE CIVIL. — 21 M. 4 = 7 M.L.J. 273.

in character to the kinds of interference specifically referred to in the earlier part of the section.

We, therefore, conclude that the decision of the Courts below is correct, and we dismiss this second appeal with costs.

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21 M. 5.

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

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MUNICIPAL COUNCIL, COCANADA (*Defendant*), *Petitioner v.* ROYAL INSURANCE COMPANY, LIVERPOOL (*Plaintiff*), *Respondent.**
[10th and 24th September, 1897.]

*District Municipalities Act—Act IV of 1884 (Madras)—Profession tax—English Insurance Company carrying on business by agents in India.*

The plaintiff was an English Insurance Company which carried on business at Cocanada by its agents, merchants of that place, at the business premises of the agents. The Municipal Council of Cocanada having levied profession tax on the plaintiff, this suit was brought in 1896 to recover the amount :

*Held*, that the tax had been illegally levied, and that the plaintiffs were entitled to a decree for its refund.

[R., 24 M. 205 (212).]

PETITION under Small Cause Courts Act, Section 25, praying the High Court to revise the proceedings of K. Krishna Rao, Subordinate Judge of Cocanada, in small cause suit No. 81 of 1896.

The plaintiffs were the Royal Insurance Company, Liverpool. They had no place of business of their own at Cocanada, but Messrs. Wilson & Co., merchants of that place, acted as their [6] agent there. Defendants were the Municipal Councillors, Cocanada, who had levied from the plaintiffs Rs. 50 on account of profession tax under the District Municipalities Act (Madras), Act IV of 1884.

The present suit was brought to recover the amount so levied.

The Subordinate Judge passed a decree in favour of the plaintiffs.

The defendants preferred this revision petition.

Mr. *N. Subramaniam*, for appellant.

Mr. *R. A. Nelson* and Mr. *R.F. Grant*, for respondent.

### JUDGMENT.

The decision of the Subordinate Judge is right. The case is exactly similar to that reported as *Corporation of Calcutta* v. *Standard Marine Insurance Company* (1), which construes the substantially similar provisions of Bengal Act II of 1888. We concur in the reasoning of the learned Judges in that case and must hold that the plaintiff company was not liable to any tax under Schedule A of the Madras District Municipalities Act IV of 1884.

We can only gather the intention of the Legislature from the language it uses in its enactments, and that language does not make the plaintiff company liable to the tax levied from them by the defendant Municipality.

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* Civil Revision Petition No. 245 of 1896.

(1) 22 C. 581.

We may observe that, in the recent revision of the Act by Madras Act III of 1897, the schedule has been amended so as to include every company, no matter what may be the business carried on by it; but this revision cannot have retrospective effect so as to legalize the levy of the tax under the former Act. On the contrary, the change of language is significant as indicating that the Legislature considered the provisions of the old Act defective.

1897 SEP. 24. APPELLATE CIVIL. 21 M. 8.

We dismiss the petition with costs.

21 M. 7=7 M.L.J. 290.

## [7] APPELLATE CIVIL.

*Before Mr. Justice Davies and Mr. Justice Boddam.*

THEYYAVELAN (*Plaintiff*), *Appellant*, *v.* KOCHAN AND ANOTHER (*Defendants Nos.* 1 *and* 2), *Respondents.** [23rd September, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Section* 317*—Certified purchaser—Assignment from a certified purchaser.*

A person taking an assignment from a certified purchaser at a Court sale is not entitled under Civil Procedure Code, Section 317, to object to the maintainability of a suit to recover the land purchased, on the ground that the purchase was made benami.

[F., 26 C. 950=3 C.W.N. 657; 5 C.W.N. 341; 18 M.L.J. 305; 4 P.R. 1904=28 P.L.R. 1904.]

SECOND appeal against the decree of J. H. Munro, Subordinate Judge of Calicut, in Appeal Suit No. 358 of 1895, modifying the decree of V. Ramasastri, District Munsif of Temelprom, in Original Suit No. 424 of 1893.

The plaintiff was the undivided brother of defendant No. 1, and he brought this suit for partition of their property including, among the properties to be divided, certain lands which were in question in this second appeal. The case of defendant No. 1 was that they were his self-acquisitions, he having obtained them by assignment from one Pangi who had purchased them at a Court sale held in execution of a decree against the plaintiff's family. The plaintiff alleged that the purchase by Pangi was made benami for the family with family funds, and that they were bought back by defendant No. 1 on account of the family.

The District Munsif decided in favour of the case set up by the plaintiff, but the Subordinate Judge on appeal expressed the view that the rights of defendant No. 1 were identical with those of his assignor, and that as his assignor was the certified purchaser, Civil Procedure Code, Section 317, prevented the title from being impugned on the ground that the purchase was benami. He modified the decree of the District Munsif accordingly.

The plaintiff preferred this second appeal.

*Ryru Nambiar*, for appellant.

*Subramania Ayyar*, for respondents.

### JUDGMENT.

[8] Section 317 of the Code of Civil Procedure debars a suit against a 'certified purchaser' by a person claiming to be the real purchaser or deriving title from the real purchaser.

* Second Appeal No. 633 of 1897.

1897 SEP. 23. — APPELLATE CIVIL. — 21 M. 7= 7 M.L.J. 290.

The contending parties here do not occupy the positions contemplated in the section, as the first defendant is not the certified purchaser, but an assignee of the certified purchaser. The assignment by the certified purchaser to the first defendant does not clothe him with the certified purchaser's right to object to the maintainability of a suit as if it had been brought against himself. The protection given to the certified purchaser cannot be transferred by him. The first defendant did not therefore stand in the certified purchaser's shoes as the Subordinate Judge has held. We must accordingly reverse his decree and remand the appeal for disposal upon the merits.

Costs will abide the result.

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21 M. 8.

## APPELLATE CIVIL.

*Before Mr. Justice Benson and Mr. Justice Boddam.*

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KRISHNAN NAMBIAR AND OTHERS (*Defendants Nos.* 2, 7 *and* 9 *to* 12), *Appellants v.* KANNAN AND ANOTHER (*Plaintiff and Defendant No.* 8), *Respondents.** [21st October, 1897.]

*Limitation Act—Act XV of* 1877, *Schedule* II, *Articles* 115, 116—*Covenant implied in registered sale-deed* - *Transfer of Property Act—Act IV of* 1882, *Section* 55—*Implied covenant for title—Damages for breach—Civil Procedure Code, Section* 13—'Res judicata.'

On 8th February 1889 the defendant sold to the plaintiff, under a registered conveyance containing no express covenant for title, land of which he was not in possession, and the purchase money was paid. The plaintiff and the defendant sued to recover possession, but failed on the ground that the vendor had no title. The plaintiff now sued on 7th February 1895 to recover with interest the purchase money and the amount of costs incurred by him in the previous litigation:

*Held*, that the suit was not barred by limitation, that the defendant was not entitled to give evidence of his alleged title, and that the plaintiff was entitled to the relief sought by him.

[N.F., 35 M. 39 (41) = 8 Ind.Cas. 1087 = 9 M.L.T. 467 = (1910) M.W.N. 827; F., 11 Ind. Cas. 337 (338) = (1911) 1 M.W.N. 361; 15 M.L.J. 396; 25 M. 587 (597); R., 34 M. 167 (170) = 7 Ind.Cas. 399 = 20 M.L.J. 989 = 8 M.L.T. 194 = (1910) M.W.N. 316; 8 A.L.J. 807 = 11 Ind. Cas. 936 (938); 6 C.L.J. 398 (401); 2 N.L.R. 174 (177); D., 24 M. 23 = 10 M.L.J. 349.]

SECOND appeal against the decree of B. Macleod, Acting District Judge of North Malabar, in Appeal Suit No. 344 of 1895, [9] modifying the decree of P. J. Itteyerah, District Munsif of Cannanore, in Original Suit No. 49 of 1895.

On the 8th February 1889 the plaintiff purchased certain land from defendant No. 2 as karnavan of the tarwad, to which he and the other defendants belonged. The land was then in the occupation of third parties. Accordingly the vendor and purchasers jointly sued for possession, but they failed to prove that the vendor had any title to the land, the issue being finally determined on 19th December 1892.

The plaintiff instituted the present suit on 7th February 1895 to recover the purchase money with interest, and the amount of costs incurred by him in the previous suit, and the amount recovered from him in execution of the decree therein.

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* Second Appeal No. 1138 of 1896.

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21 M. 8.

The District Munsif dismissed the suit as being barred by limitation. On appeal the District Judge passed a decree for the purchase money with interest only.

The defendants preferred this second appeal.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*), for appellants.

*Sankaran Nayar* and *Ryru Nambiar*, for respondent No. 1.

## JUDGMENT.

The learned Advocate-General on behalf of the appellants argues that, as the covenant of title was not embodied in words in the sale-deed, but is implied by law under Section 55 of the Transfer of Property Act, it cannot be regarded as a contract in writing registered, and therefore does not fall under Article 116 of the second schedule of the Limitation Act, but under Article 115.

With that contention we cannot agree. The contract of sale being in writing and registered, all terms which the law implies, or reads as part of the contract, must also be regarded as part of the registered writing.

This view was that adopted by Parker, J., in *Chinna Narayana Reddi* v. *Peda Rama Reddi* (1). The suit was therefore not barred by limitation.

The only other ground urged is that the Lower Courts were wrong in deciding that the tarwad's title to the property was not a question to be gone into in the present suit, as it had been decided in the former litigation.

**[10]** In that litigation the present plaintiff and the second defendant (as representing the tarwad) were joint plaintiffs, and it was then found as between each of them and the persons in possession of the property that the second defendant and his tarwad had no title to the property. The title to the property is therefore *res judicata* as between the persons in possession and the second defendant and his tarwad. It is idle to contend that, in these circumstances, any useful purpose was, or could be, served by admitting evidence as to the tarwad's alleged title. On both grounds then the second appeal fails and is dismissed with costs.

The plaintiff files a memorandum of objections to so much of the decree as disallows his claim for costs of the former litigation, *viz.*, Rs. 527-15-2 *plus* Rs. 69-11-0 and for interest on the purchase money prior to the plaint.

On both points we think the objections are valid. The costs of the litigation which resulted from the breach of covenant of title are proper damages and not too remote. The omission as regards interest is clearly a clerical error. We allow the memorandum of objections with costs in the Lower Appellate Court and in this Court, and modify the decree accordingly. The rate of interest will, however, be 6 per cent. as allowed by the District Judge, not 12 per cent. as claimed. We allow interest at 6 per cent. on the costs of the former litigation.

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(1) Appeal against Order No. 82 of 1890 reported in 1 M.L.J. 479.

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## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.*

Ganapati Ayyan and another (*Plaintiffs*), *Appellants* v. Savithri Ammal and another (*Defendants*), *Respondents*.*
[17th September and 5th October, 1897.]

*Hindu Law—Agreement on adoption—Charitable endowments—Civil Procedure Code, Section 30—Interest sufficient to support a suit relating to charity.*

A Hindu shortly before his death directed his wife and mother to employ part of his property for the maintenance and upkeep of a charitable institution, being a choultry where Japta Brahmans and travellers were fed, and at the same time empowered his wife to make an adoption, declaring that the adopted son should have no interest in the property devoted to the charitable purpose. On [11] his death the widow and mother executed a document, relating to the property, to give effect to the wishes of the deceased for the benefit of Brahmans; and three years later the widow took in adoption a boy whose father acquiesced in the deceased man's dispositions. The charitable trust having been neglected and the adoptive son having taken possession in his own right of the lands constituting the endowment, two Brahman residents of the neighbourhood who had obtained leave under Section 30, Civil Procedure Code, instituted a suit as representing the Brahman community at large to remove the widow from the office of trustee, to have the adopted son declared ineligible for that office and for the appointment of a new trustee:

*Held*, that the plaintiffs possessed sufficient interest in the charity to enable them to maintain the suit, and that they were entitled to the relief claimed by them.

[R., 33 C. 789 (802) = 10 C.W.N. 581 (585); 33 C. 905 = 10 C.W.N. 867; 26 M. 143 = 12 M.L.J. 197; 27 M. 577 (586) = 14 M.L.J. 310 (419).]

Appeal against the decree of C. Venkoba Chariar, Subordinate Judge of Tanjore, in original suit No. 18 of 1895.

The plaintiffs, two Brahman residents of Mannargudi taluk, having obtained permission of the Court under Civil Procedure Code, Section 30, brought this suit as representing the Brahman community for the removal of defendant No. 1 from the trusteeship of a charity founded by her late husband, as it was alleged, for the benefit of Brahmans generally, and secondly for a declaration that defendant No. 2 was not eligible for the office of trustee, and thirdly for the appointment of a new trustee.

The plaintiffs' case was that the deceased husband of defendant No. 1 had some years before his death established and endowed a choultry at Nagai for the feeding of Brahmans, and had performed the charity until his death in November 1878; that shortly before his death he had directed his mother to continue the charity and arranged that with the profits of part of the land constituting the endowment, defendant No. 1 should maintain another choultry which he desired her to establish at Adhichapuram; and that after the death of his mother all the endowments should go to the benefit of the new choultry, the charity at Nagai being discontinued. At the same time he empowered defendant No. 1 to make an adoption on the understanding that the adopted son should have no interest whatever in the charity properties. It was stated that, after the founder's death, the charity at Nagai was carried on by his mother only until she died in 1890, since when the choultry at that place had fallen

* Appeal No. 90 of 1896.

into decay, and that defendant No. 1 had taken defendant No. 2 in adoption and allowed him to take possession of the properties devoted to the charity neglecting to carry out the trust.

[12] It appeared that shortly after the founder's death his mother and his two widows, including defendant No. 1, had executed a deed of settlement, dated 15th November 1878 (Exhibit A), embodying the directions of the deceased founder and that, at the time of the adoption of defendant No. 2, a similar agreement was drawn up and executed by his natural father ratifying those directions, and agreeing that after the death of defendant No. 1 defendant No. 2 should be the trustee and manager of the charities and otherwise should have no claim on the properties constituting the endowment. Defendant No. 1 admitted the trust and stated that she had performed it in part and would have done so completely but for a suit instituted in 1886 on behalf of the adopted son by his natural father as next friend which she had been compelled to compromise with the result that she lost possession of the properties.

The Subordinate Judge held that all the plaintiffs' averments were established by the evidence, but he dismisssd the suit on the ground that the plaintiffs were not beneficiaries possessing an interest in the charity sufficient to support the suit. "The plaintiffs described themselves," he said, "as permanent residents of Nemmeli in the taluk of Mannargudi. "The simple fact that they are Smarta Brahmans is not, I think, a sufficient qualification to enable them to come in as beneficiaries. The charity "according to the evidence was confined to Japta Brahmans and travellers, "including perhaps pilgrims to Rameswaram, if any. The plaintiffs are "neither the one nor the other."

The plaintiffs appealed.

*Sundara Ayyar* and *Ramachandra Ayyar*, for appellants, contended (1) that the appellants had sufficient interest to sue, and (2) that there was a trust created by the deceased, and cited *Bhaskar* v. *Saraswati* (1).

*Srinivasa Ayyangar*, for respondent No. 1.

*Pattabhirama Ayyar* and *Ranga Ramanuja Chariar*, for respondent No. 2 contended that no trust or alienation of any sort had been effected, and that, if there was any alienation, the adopted son was entitled to set it aside.

## JUDGMENT.

SHEPHARD, J.—After deciding all the other issues in the appellants' favour, the Subordinate Judge dismissed the suit on the [13] ground that they had failed to prove such an interest in the subject-matter as to entitle them to maintain it. It is first to be observed that this point was not taken in the written statement and was not included in any of the thirteen issues, though it was taken and overruled in the proceedings before the Collector when sanction to prosecute the suit was asked for and granted to the plaintiffs. It has been repeatedly held in this country that such a suit as the present may be instituted by any member of the class intended to be benefited by the charity for the support and preservation of which the aid of the Court is invoked. According to the document which evidences the institution of the charity the class for which it was intended comprised Brahmans generally. The document does not restrict the charity to any particular sect, nor does the oral evidence show that the alleged founder Gopalakrishna Ayyan excluded from his

(1) 17 B. 486.

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bounty such Brahmans as the plaintiffs might properly be taken to represent. The circumstance that the Brahmans entertained by him were ordinarily Japtas or travellers does not, especially when taken with the language of the instrument of dedication, indicate any intention to restrict the charity to Brahmans answering to one or other of those descriptions. For these reasons, I think, the Subordinate Judge was wrong in dismissing the suit on the ground of want of interest in the plaintiffs. I have now to consider the several points raised on behalf of the respondent, Gopala Ayyan, who is the adopted son of the alleged founder of the charity. It was first contended that the story told by the plaintiff's witnesses and recited in the instrument of 1878 and again in the agreement of 1881 relating to the adoption, was a pure invention, that Gopalakrishna Ayyan never made any arrangement or gave any instructions such as are attributed to him, and that his widows and mother never had any real intention of dedicating property to charitable purposes. Although the instrument of 1878 was executed only ten days after his death and actually written by the second respondent's father, although the same facts are recited in the agreement of 1881 to which the second respondent's father was a party, and although the same individual representing one of the widows, insisted before the tahsildar in 1883 that the charity should be maintained as it had been instituted by the adoptive father of the second respondent, we are asked to say that the idea of dedicating property to charity originated solely in the minds of the widows, and was carried out [14] merely as a scheme for preserving to them as against a child who might be adopted some control over the property of their deceased husband. A more hopeless contention can hardly be conceived. It seems necessary to observe that there is a strong presumption in favour of the truth of statements recorded in writing by persons who are under no disability, and that the Court is most reluctant to hold that the parties did not mean what they said. I think there can be no doubt that the widows intended to create or confirm a valid trust, and further I agree with the Subordinate Judge in finding that they acted in conformity with directions given by their deceased husband. The question then is whether the evidence justifies the finding that there had been a previous declaration of trust by the husband. The plaint alleges that fifteen years before his death he had set apart certain lands for charitable purposes and there is some general evidence in support of the allegation. It certainly is proved that, for some years, he had been carrying on the charities which are mentioned in the instrument of 1878, and it is probable that he did so with the proceeds of the Adhichapuram lands. But I do not think it is proved that he dedicated any particular lands or even any particular share to this purpose. The evidence is wholly wanting in the precision and detail requisite for the proof of such a dedication, when no written instrument executed by the alleged founder is produced. It is not unimportant that he did execute a registered deed for the benefit of a Siva temple.

But I think there is another ground on which the plaintiffs' claim may be supported. As an act done by the widows in pursuance of the instructions of their husband, the deed of settlement of 1878 would be inoperative as against the adopted son. Regarded as an incomplete gift made by the husband and carried out by the widows, it could not stand on a higher footing than would a will executed by Gopalakrishna Ayyan, and the interest of the adopted son clearly could not be defeated by a will. But if the directions given by Gopalakrishna Ayyan to the widows regarding his charities, and the mode of maintaining them

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are associated with the direction to take a child in adoption, it may fairly be inferred that he did not intend an adoption to take place, except on the condition that his directions as to the charities are observed. This is the view of the matter which the widows actually took, for the father admits that they would not have taken [15] his son unless he had consented to maintain the charities. The written agreement made in respect of the adoption shows that the adoption was made on that condition and on the other terms mentioned in the instrument of 1878. If the condition had been originated by the widows, it might not have been binding on the adopted son, but seeing that the husband's authority was qualified by a condition which he was at liberty to impose, and that the condition was insisted on when the authority was exercised, I think the adopted son is in no other position than he would be, if Gopalakrishna Ayyan himself had taken him in adoption, at the same time declaring that he did so only on the condition of certain property being set apart for charity. As there would have been no adoption if the requisition of the widows had not been obeyed, and as the widows were entitled and indeed bound to make that requisition, I do not think it is open to the adopted son, now to repudiate the condition. In this view of the facts, the decision in *Lakshmi* v. *Subramanya* (1) applies.

The decree of the Subordinate Judge will be reversed. It being necessary to provide for the conduct of the charity and the second defendant having, in consequence of his conduct, forfeited his right to act as trustee, we must direct the Subordinate Judge to inquire and submit the name of some competent person willing to accept the office. The trustee when appointed will be subject to the superintendence of the Tanjore District Board, and his accounts will be open to the inspection of the managing member of the founder's family for the time being. The Subordinate Judge will also ascertain the probable average income of the endowments and submit a scheme for the disposal of the income in accordance with the wishes of the founder. On the occasion of a vacancy, the President of the Local Board to appoint a successor out of the founder's family, if possible. The Subordinate Judge will be at liberty to apply for further directions. The second defendant must pay the plaintiff's costs in this and in the Lower Court.

The report is to be submitted within three months from the date of the receipt of this order, and seven days will be allowed for filing objections after the report has been posted up in this Court.

SUBRAMANIA AYYAR, J.—I wish to make a few observations only, with reference to the contention urged on behalf of the second [16] defendant, that the dedication of the lands to the charity in question is not binding upon him.

The evidence clearly proves that the second defendant's adoptive father Gopalakrishna Ayyan, shortly before his death and during the illness which terminated fatally, directed his widows to make the dedication referred to and authorized the adoption of a son to him. Accordingly ten days after his death, they executed Exhibit A and handed over possession of the property dedicated to the person who was entrusted with the management of the affairs of the charity, and about two or three years after Exhibit A, the second defendant was adopted. It is also established that the natural father of the second defendant gave him in adoption with

(1) 12 M. 490.

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the full knowledge of the alienation and acquiescing in it and that, but for such acquiescence, the second defendant would not have been adopted.

The contention on behalf of the second defendant was twofold, first, that though the second defendant was adopted in 1881, yet his title related back to the date of the adoptive father's death, and as Exhibit A was later, the alienation is not binding on him; secondly, even if his rights accrued from 1881, still he is entitled to set aside the alienation. The first part of the contention may be dismissed from notice, for it is too late to question the doctrine that the adopted son's rights arise from the time of the adoption (*Bamundoss Mookerjea* v. *Mussamut Tarinee* (1)). The second part of the contention alone requires some consideration. Now under the nuncupative will of Gopalakrishna Ayyan—such in my view do the instructions evidenced by Exhibit A amount to (compare *Hari Chintaman Dikshit* v. *Moro Lakshman* (2)), the direction that the property be devoted to the charity and that the authority to adopt, both should be given effect to only after his death. Though in fact the second defendant was adopted two or three years subsequent to the execution of Exhibit A, yet his case cannot possibly be put on a higher footing than if he had been adopted at the moment of the adoptive father's death. Let us, for argument, suppose that such was the case. It is clear that the direction as to the allotment of the property to the charity was an oral devise, which became operative the moment the testator died and as *ex hypothesi*, the second defendant's title to his adoptive father's [17] estate accrued then and not earlier, it is difficult to see how on principle the defendant could be entitled to question the alienation. For, unlike the case where the adoption takes place before the will comes into force, the adopted son's right, according to the supposition, comes into existence simultaneously with the right of the charity. How then can the former derogate from the latter right? Even if the above view were unsustainable (though it is not easy to see how it could be), the second defendant must nevertheless be held bound by the alienation. For the circumstances in which the adoption took place rendered it conditional on the alienation not being challenged by the adopted son, and the case would then be clearly governed by the decision in *Lakshmi* v. *Subramanya* (3), *Narayanasami* v. *Ramasami* (4), and *Basava* v. *Lingangauda* (5).

If, from the hypothetical case, we turn to the actual facts of the case before us, there is no doubt that the title of the adopted son could not affect the right of the charity for the latter right had vested long before the adopted son's right arose. The second defendant's rights must therefore be held to be subject to that created in favour of the charity by the oral devise, and it is hardly necessary to point out that Exhibit A does not evidence an alienation by the widows, but is a mere formal declaration executed by the persons appointed by the testator to bring into existence such written evidence of his disposition and who held possession of the property devised till they transferred the same, to the duly constituted manager of the charity only as the trustees for the charity. Compare *Bhaskar Purshotam* v. *Sarasvatibai* (6).

In the view I have taken of the case, it has become unnecessary to consider, supposing that the direction to transfer to the charity amounted not to a devise, but to a mere power to transfer at the discretion of the

(1) 7 M.I.A. 169. (2) 11 B. 89. (3) 12 M 490.
(4) 14 M. 172. (5) 19 B. 428. (6) 17 B. 486.

widows, whether the execution of such power, before the power to adopt was exercised, would not disentitle the adopted son to question the alienation. 1897 Oct. 5.

I, therefore, concur in the conclusion arrived at by my learned colleague. Appellate Civil.

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## [18] APPELLATE CIVIL.

*Before Mr. Justice Benson and Mr. Justice Boddam.*

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NAINAPPA CHETTI (*(Defendant No.* 1), *Appellant v.* CHIDAMBARAM CHETTI AND OTHERS (*Plaintiff and Defendants Nos.* 2 *to* 9), *Respondents.** [14th, 18th, 20th and 27th October, 1897.].

*Civil Procedure Code—Act XIV of* 1882, *Sections* 12, 13—' Res judicata'—*Transfer of Property Act—Act IV of* 1882, *Sections* 91, 95—*Redemption—Ejectment suit by mortgagor—Subsequent suit for redemption.*

A zamindar mortgaged his estate under four successive instruments to the same creditor who was subsequently placed in possession. On the death of the mortgagor, his son, claiming to have succeeded by the law of primogeniture to the zamindari as an impartible estate, sued to eject the mortgagee; and a decree was passed declaring what was the sum due on a date named and how far it was binding on the estate, and decreeing that, on payment of what might be due on taking an account, the mortgagee should give up possession. Many years later the zamindar applied to the Court to carry out this decree, and a like application was put in by the present plaintiff to whom seven-eighths of the equity of redemption had been assigned. Both of these applications were rejected in the High Court as barred by limitation, and the applicants applied for leave to appeal to the Privy Council against the order of the High Court. Meanwhile the plaintiff brought the present suit to redeem the mortgages of the late zamindar:

*Held*, (1) that the suit was not barred under Civil Procedure Code, Section 12, by reason of the pendency of the application for leave to appeal to the Privy Council;

(2) that, as there was no decree for foreclosure passed in the previous suit which had been treated as a suit for redemption, the present suit was not precluded by the decree therein;

(3) that the findings in the previous suit as to the amount of the debt and the extent to which it bound the estate were *res judicata*;

(4) that the plaintiff was entitled to redeem the whole mortgages, although he was assignee of only seven-eighths of the equity of redemption, as the owner of the remaining one-eighth was joined as defendant and did not apply to be made plaintiff.

[Overr., 25 M. 300 (F.B.); R., 24 A. 44=A.W N. (1901) 194 (F.B.); 93 P.R. 1908=164 P.L.R. 1908=133 P.W.R. 1908; 100 P.R. 1905=16 P.L.R. 1906; D., 21 A. 251.]

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East), in original suit No. 45 of 1895.

Suit for redemption. The Subordinate Judge's statement of the facts giving rise to the litigation, which is referred to by the High Court was to the following effect:—

On the 1st December 1862, the then Zamindar of Varapur, who was the father and predecessor-in-title of defendant No. 4, mort-[19]gaged his estate to the father of defendant No. 1 for Rs. 32,000 under an instrument filed as Exhibit A, by which "it was stipulated," as the Subordinate Judge

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* Appeal No. 75 of 1896.

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said, "that all the incomes from the village should be paid to the "mortgagee after collecting money in the presence of his men; that "the mortgagee should deduct Rs. 1,895-14-6 for peishcush, as also "Rs. 360 for the mortgagor's domestic expenses and the salary as "per mobini list furnished of the establishment of his Karaivasal; "and that he should, out of the amount left, pay towards interest "for each Fasli on the amount of this bond and enter payment on "the same of the remainder towards the principal due thereunder. "It was further provided that counter interest would be allowed on the "principal so paid and that, when payment was made in the manner "aforesaid, if income fell short to meet the interest of each year, the "balance should be made good by the mortgagor out of his private funds." On 10th September 1863, the mortgagor by Exhibit B further charged the estate in favour of the same mortgagee to secure Rs. 3,000 and interest, and on 11th August 1864, the mortgagor, by Exhibit C, further charged the estate in favour of the same mortgagee to secure Rs. 7,397-7-0 with interest. "This was followed," as the Subordinate Judge said, "by "a simple bond (Exhibit D) between the same parties, dated 25th June "1867, whereby fourth defendant's father bound himself to pay, with the "same rate of interest a sum of Rs. 1,767-5-8 being balance of interest on "the first three bonds after deducting payment towards interest out of the "income from the village and sundry other sums received. First defend-"ant's father was never put in possession of the zamindari under any of "the above documents; but on the 3rd December 1868 he and fourth "defendant's father entered into an agreement (Exhibit E), whereby in "consideration of the amount of the four bonds and for the interest set-"tled therefor, he was allowed to enjoy all the villages incurring certain "specified expenses for the fourth defendant's father and for the up-keep "and improvement of the village."

The mortgagor having died in 1870, his son and successor, the present defendant No. 4, instituted civil suit No. 118 of 1874 against the son of the mortgagee, the present defendant No. 1, for possession of the estate with mesne profits alleging that the zamindari was impartible, that he had succeeded to it under the [20] law of primogeniture on the death of his father who had merely a life interest, that the mortgages were not necessary for the family and that the late zamindar had been induced to execute them by the fraud of the mortgagee, and that they had been discharged.

Issues were framed in that suit as to the amount of the debt and as to "the extent, if any, to which the estate is liable."

In the result the estate was found to be impartible and the High Court in appeal No. 98 of 1880 passed a decree declaring that there was due to the defendant on the 24th March 1880 a sum of Rs. 54,697-4-6 and that the defendant was, on the one hand, entitled to further interest and was, on the other hand, liable to account and ordering that on the plaintiff paying to the defendant the balance so found to be due on the taking of the accounts, the defendant should deliver up possession of the estate.

During the pendency of these proceedings, *viz.*, on 27th March 1896, the zamindar mortgaged the estate for Rs. 4,000 and interest to the present defendant No. 2. The estate was afterwards brought to sale in execution of the decree in original suit No. 24 of 1879, and purchased by V. R. Alagappa Chetti. This sale was made subject to the mortgage of 1876, and the mortgagee brought a suit on his mortgage against the

zamindar and his son (the present defendant No. 5) and the purchaser, and obtained a decree for Rs. 7,828-14-4 in original suit No. 20 of 1884. 1897 Oct. 27.

The zamindar then leased the estate on 1st March 1892 for 15 years to Mari Chetti, the present defendant No. 6, who applied to the District Court on 29th June 1892 by civil revision petition No. 100 of 1892 to enforce the decree of the High Court, abovementioned, offering to pay the balance, if any, which might be found due to the mortgagee in possession. On 30th July 1892 the zamindar made a like application "without prejudice to the lessee's rights" alleging that the claim of mortgagee in possession had been satisfied by the rents and profits. These applications were resisted on the ground that the zamindar had no further interest in the estate which had been sold in execution of the decree in original suit No. 20 of 1884 and purchased by the decree-holder, *viz.*, the present defendant No. 2. This objection was overruled, because the holder of the decree of 1884 had no *locus standi* in these proceedings. "Commissioners were then appointed," said the Subordinate Judge, "to investigate the "accounts, and the [21] present District Judge, hearing the objection thereto, passed an order (Exhibit No. 4), on the 2nd May 1893, declaring that "the sum of Rs. 1,339-7-3 was due to the first defendant on the 1st "July 1892, and that, on payment of the said amount, the fourth defendant was entitled to recover possession of the zamindari and all its "appurtenances. First defendant appealed against this order to the High "Court in civil miscellaneous appeal No. 58 of 1893, and it was held that "the decree, being a final one so far as it went, was capable of immediate "execution and that no steps having been taken by the decree-holder since "the passing of the decree in 1882, its execution was time-barred. They "accordingly allowed the appeal and dismissed the original application for "execution. During the pendency of the second defendants' appeal "against order No. 8 of 1893, he and his son, third defendant herein, "conveyed to the present plaintiff their seven-eighth share in the zamindari "purchased by second defendant in execution of the decree in original "suit No. 20 of 1884 on the file of this Court, and the latter was, therefore, "allowed to join as a supplemental appellant with that defendant, and the "present first defendant had also made him a respondent in his appeal "against the order of the District Court in No. 58 of 1893. The High "Court's order on the latter petition being adverse to the claim of both "the plaintiff and the fourth defendant, he has also joined the fourth "defendant in applying to the High Court for leave to appeal against it to "the Privy Council (Exhibit 11) and while, that application was pending, "the present suit was brought by him praying judgment (1) that, on "payment to the first defendant of the sum of Rs. 1,339-7-3 found due "to him by the District Judge's order (M4), dated 2nd May 1893, and now "deposited in Court or such further or other sum as may be found payable "to the first defendant, the defendants do deliver up to the plaintiff all documents in their possession or power relating to the mortgaged property, "and do transfer the mortgaged property free from the mortgage and from "all encumbrances created by the defendants or any person claiming "under them, and put the plaintiff in possession of the property, (2) for "mesne profits from the date of the suit till the date of plaintiff being put "in possession, (3) for costs of the suit, and (4) for such other relief as, upon "the facts, the plaintiff may be entitled to. The plaint refers to the various "documents A.B.C. and D and states that [22] as purchaser of the seven-eighth share of the properties, he was entitled to redeem the mortgage and "to recover possession of the said properties on payment of Rs 1,339-7-3 or

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"such further or other sums as may be found due to the first defendant on "taking an account, and the defendants Nos. 6 to 9 are impleaded as "they set up a right to hold possession of the properties in suit under "leases alleged to have been executed in their favour by the fourth "defendant."

Defendant No. 1 defended the suit on the ground *inter alia* that it was not maintainable by reason of Civil Procedure Code, Section 12. This plea was dealt with by the Subordinate Judge in paragraph 9 of his judgment which is referred to in the judgment of the High Court as follows :—

"The first objection is that, the plaintiff having joined the fourth "defendant in making an application to the High Court for leave to "appeal to the Privy Council against the decree in civil miscellaneous "appeal No. 58 of 1893 on the file of that Court, he is not entitled "to prosecute the present suit under Section 12 of the Civil Procedure "Code. But, in the first place, the mere applying for, or obtaining, leave "to appeal to the Privy Council cannot of itself amount to the pendency "of an appeal till such appeal is actually filed, for it may happen that the "parties, who obtain such leave, may never appeal at all against such "decree or order. In the next place, that order of the High Court was "in an execution case and refused execution of the decree on the ground "that the application was barred under Article 179 of the Limitation "Act, while the present is a suit for redemption based on the original re-"lation of mortgagor and mortgagee; and since there is no previously "instituted suit or appeal now pending nor is the Court asked to try any "suit in which the matter in issue is also directly aud substantially in "issue in a previously instituted suit between the same parties, Section "12 of the Code of Civil Procedure can be no bar to its trial. Thirdly, "the present plaintiff or second defendant never joined in those proceed-"ings, except with a view of preventing the fourth defendant from execut-"ing the decree and took no steps to execute it for themselves, and the "High Court has also refused to allow them to intervene in those pro-"ceedings to execute the decree, as they were no parties thereto, and also "because no application has been made on the ground that they were "assignees by operation of law and as such [23] entitled to execute the "decree, and the zamindar had, therefore, no subsisting right. On all "these grounds, I overrule the first objection."

The Subordinate Judge passed a decree for the plaintiff, against which five appeals were preferred. Of these, the above appeal by defendant No. 1 was determined by that portion of the judgment of the High Court which is given below.

*Sankaran Nayar*, *Narayana Rau* and *Subramania Ayyar*, for appellant.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*), *Krishnasami Ayyar*, *Sundara Ayyar* and *Sesha Chariar*, for respondent No. 1.

*Seshagiri Ayyar*, for respondent No. 4.

*Tirumalaisami Chetti*, for respondent No. 6.

## JUDGMENT.

Plaintiff, as purchaser of the equity of redemption of a certain village, sued to redeem on payment of the mortgage money.

Various objections were raised by the contesting defendants, but they were disallowed by the Subordinate Judge, who gave plaintiff a decree for redemption. Against this decree the first, sixth, fifth, and fourth defendants separately appeal in appeal suits Nos. 75, 92, 145 and 146 of 1896.

The plaintiff also appeals (appeal suit No. 62) against a small part of the decree. 1897 OCT. 27.

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The facts, out of which the litigation has arisen, are complicated, but they are fully stated in paragraph 1 of the Subordinate Judge's judgment and need not be repeated here.

The main appeal is that of the first defendant. His chief contention before us is that the only remedy of the mortgagor, or of the plaintiff, as assignee of the equity of redemption, was to have executed the decree in appeal suit No. 98 of 1880, and that, as execution of that decree is now barred, he has lost the right to redeem and cannot fall back on the original mortgages (A, B, C and E) and sue to redeem them. He contends that those mortgages are merged in the decree in appeal suit No. 98 of 1880. He further contends that, as the plaintiff in the present suit claims to redeem on payment of the sum of Rs. 1,339-7-3, which was the sum found to be due to first defendant up to 1st July 1892 on the basis of that decree, the suit is really one based on that decree not on the prior mortgages, and that it is therefore not sustainable. He relies on the decision of the Privy Council in [24] the case reported as *Hari Ravji Chiplunkar* v. *Chapurji Hormasji Shet* (1).

We do not think that these contentions are valid, or that the case is in point. By the decree in appeal suit No. 98 of 1880 the fourth defendant was to recover the mortgaged property provided he discharged the mortgage, but there was no foreclosure clause in the decree. It is a well settled rule of law in this Presidency that such a decree does not of itself operate to foreclose the right of redemption (*Sami* v. *Somasundara* (2), *Periandi* v. *Angappa* (3), *Karuthasami* v. *Jaganatha* (4), and *Ramunni* v. *Brahma Dattan* (5)), nor does it alter the previously existing legal relation of mortgagor and mortgagee. If the decree-holder fails to exercise the right of redemption given to him by the decree, he, in effect, declines to put an end to the relation, and in time his right to execute the decree becomes barred, but the legal relation of mortgagor and mortgagee continues; and the mortgagor may, in a fresh suit, again assert his right to redeem on payment of such sum as may then be due, which sum may, on taking an account, be greater or less than the sum which was requisite under the former decree. There is nothing in the Privy Council case of *Hari Ravji Chiplunkar* v. *Chapurji Hormasji Shet* (1) to overrule the established course of decisions in this Presidency. In that case the plaintiff deliberately brought his suit, not on the prior mortgage, but 'on the new basis' of the decree in which he declared that the prior transactions had 'merged,' and the date of the cause of action was stated to be that of the decree. That decree was in accordance with an award of arbitrators, and that was, no doubt, the reason why the plaintiff was particular to base his suit on the decree not on the mortgages. In fact, as their Lordships remark, "he treated the decree as the mortgage which, he sought to redeem" and they therefore held that he could not in the course of the appeal fall back on the prior mortgage since that "would be making a different case from that which "he made in the Lower Courts, and on which the case had been tried and "decided." In the present case it is not suggested that the plaintiff's case in appeal is not that set up in the Lower Court. His suit was, and is, to redeem the prior mortgages, and this he is undoubtedly entitled

(1) 10 B. 461. (2) 6 M. 119. (3) 7 M. 423.
(4) 8 M. 478. (5) 15 M. 366.

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to do in accordance with the settled [25] course of decisions in this Presidency. Their Lordships refer to the Madras rule without disapproval, merely remarking that the plaintiff could not take advantage of it owing to the form in which his suit had been framed and put forward in the Lower Courts. In the present case the plaintiff no doubt proposed to pay and deposited in Court Rs. 1,339-7-3, the sum due up to July 1892 on the basis of that decree, but he added that he was "ready and willing to pay such further or other sum as may be "found payable to the first defendant." The Subordinate Judge, finding that the order (of the District Court on civil miscellaneous petition No. 107 of 1892, which fixed the sum at Rs. 1,339-7-3) had been set aside by the High Court (civil miscellaneous appeal No. 58 of 1893), gave no effect to it. The decree, however, in appeal suit No. 98 of 1880, (in execution of which that order had been made), had never been set aside, and the decision in that suit was held by the Subordinate Judge to be a binding adjudication between the parties as to the matters then properly in issue and finally decided between them. In that suit there was a contest as to the validity of the mortgages (A. B. C. and E) now sued on, and the binding character of the debts, and, after due enquiry, it was found that only portions of the mortgages were valid and binding on the zamindari. The Subordinate Judge adopted those findings as *res judicata*, and directed that the mortgage money now due should be calculated accordingly. The first defendant objects to this course, and pleads that if the plaintiff now sues not on that decree, but on the original mortgages, the findings in that suit should be wholly ignored, and there should be an enquiry and decision *de novo* as to the validity and binding character of the mortgage debts. The reason for his urging this is that some of the debts which were then held to be not binding on the zamindari would now, under the law as subsequently explained by the Privy Council in *Sartaj Kuari* v. *Deoraj Kuari* (1) be held to be binding; but we agree with the Subordinate Judge that a change in the law or a different interpretation of it by the appellate authorities cannot operate to re-open matters which had previously become *res judicata*. The former suit, though originally framed as a suit in ejectment, was treated as a suit to redeem the mortgages and was essentially such, as shown by the Subordinate Judge in [26] paragraphs 11 to 13 of his judgment. The issues in that suit were:—

(1) In what sum was fourth defendant's father indebted to first defendant's father and what portion if any remains due?

(2) To what extent, if at all, is the estate liable for the sum so remaining due?

It would be contrary to all principle to ignore the findings then arrived at finally between the parties by the decision of the High Court. We think, therefore, that the Subordinate Judge was right in accepting that decision not only as declaring the legal relation between the parties, but also as determining on what conditions redemption should be decreed, and the principles on which the accounts should be taken on foot of the mortgages and the sum due thereunder up to the date of that decree.

It remains to briefly notice some minor contentions of the first defendant.

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(1) 10 A. 272.

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It is contended that, as the plaintiff purchased only seven-eighths of the equity of redemption, he cannot sue for redemption without giving the owner of the remaining one-eighth the option of joining as plaintiff. The plaintiff sues to redeem the whole mortgage, and he is entitled to do so under Sections 91 and 95, Transfer of Property Act. By so doing, he puts himself in the place of the mortgagee redeemed, and may himself be redeemed by his co-mortgagor in respect of the proportionate share (*Asansab Ravuthan* v. *Vamana Rau*(1) and *Moidin* v. *Oothumanganni*(2)). In the present case we may add that neither in the Lower Court nor before us did the second and third defendants, who hold the remaining one-eighth share, apply to be joined as plaintiffs. For both reasons the objection fails. Lastly, it is contended that the steps taken by the plaintiff with a view to appeal to the Privy Council against the order in civil miscellaneous appeal No. 58 of 1893 constitute a bar to the present suit under Section 12 of the Civil Procedure Code. This plea is invalid for the reasons stated by the Subordinate Judge in paragraph 9 of his judgment.

* * * *

We have now dealt with all the matters urged before us in these appeals. The result is that we confirm the decree of the Subordinate Judge and dismiss these appeals with costs.

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21 M. 27.

## [27] APPELLATE CIVIL.

*Before Mr. Justice Davies and Mr. Justice Boddam.*

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MIR ALLI HUSSAIN AND ANOTHER (*Plaintiffs Nos. 1 and 2*), *Appellants v.*

SAJUDA BEGUM AND OTHERS (*Defendants Nos. 1, 2, and 3*), *Respondents.** [2nd April, 1897.]

*Muhammadan Law—Shiyas—Inheritance by childless widows.*

The childless widow of a Muhammadan of the Shiya school is not entitled to any share in the land left by her husband.

SECOND appeal against the decree of M. B. Sundara Rau, Subordinate Judge of Chittoor, in appeal suit No. 75 of 1893, modifying the decree of A. F. Elliot, District Munsif of Vellore, in original suit No. 20 of 1891.

The plaintiff sued to recover possession of a share in the property of Mir Abbas Mirza Saheb, deceased, an adherent of the Shiya sect.

The District Munsif passed a decree for plaintiff which was modified by the Subordinate Judge on appeal.

Plaintiff preferred the second appeal.

*Pattabhirama Ayyar*, for appellants.

Mr. *Ramasami Raju*, for respondent No. 1.

### JUDGMENT.

The authorities in support of the Munsif's finding that a childless widow of the Shiya school is not entitled to any share in the land of her husband

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* Second Appeal No. 298 of 1896.

(1) 2 M. 223. (2) 11 M. 416.

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are to be found in *Mussamut Asloo* v. *Mussamut Umdutoonnissa* (1) and *Mussumat Toonanjan* v. *Mussumat Mehandee Begum* (2). We see no reason to differ from those decisions. Elberling's work referred to by the Subordinate Judge in support of the contrary view is no authority.

We, therefore, reverse the Subordinate Judge's decree and restore that of the Munsif, with this modification that, in place of the sum of Rs. 125 to be divided between the parties in the proportions stated, the sum of Rs. 218 be inserted.

[28] We make this modification in the Munsif's decree in accordance with the findings of the Subordinate Judge which were overlooked in the passing of his decree. We also modify the decree of the Munsif as to costs by directing that the costs of the parties be borne by themselves throughout.

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**21 M. 28.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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SAMI AYYANGAR (*Defendant No.* 2), *Appellant v.* PONNAMMAL (*Plaintiff*), *Respondent.** [22nd February, 1897.]

*Hindu Law—Mortgage—Loan at time of mortgage—Whether mortgage binding on the property of the mortgagor's undivided son.*

In order to justify a sale or a mortgage by a father so as to bind his son's share of the property, there must be in fact an antecedent debt, *i.e.*, a debt prior to the mortgage or sale.

[**N.F.**, 27 M. 326=14 M.L.J. 181; **F.**, 31 A. 176=6 A.L.J. 263 (**F.B.**); 53 P.R. 1901= 62 P.L.R. 1901 (**F.B.**); **Appr.**, 29 M. 200=16 M.L.J. 69=1 M.L.T. 28; **R.**, 23 M. 60 (65); 4 Bom.L.R. 587; 17 M.L.J. 283.]

SECOND appeal against the decree of T. M. Horsfall, District Judge of Tanjore, in appeal suit No. 504 of 1894, affirming the decree of A. Sambamurthi Ayyar, District Munsif of Valangiman, in original suit No. 358 of 1889.

The appellant (defendant No. 2) was the undivided son of defendant No. 1 who in 1883 executed a hypothecation bond to the husband (since deceased) of the plaintiff who brought this suit on the bond, it having fallen to her share on a razinama entered into between her and another widow of her husband.

Both the Lower Courts gave a decree for the amount claimed on the security of the mortgaged property including the second defendant's share. Hence this appeal.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*) and *Gopalasami Ayyangar*, for appellant.

*Sankaran Nayar*, for respondent.

## JUDGMENT.

As regards the liability of the son's share for the debt of the father as a mere money claim, there can be no question, since it is found that the mortgage was for consideration and was not illegal or immoral.

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* Second Appeal No. 1597 of 1895.

(1) 20 W.R. 297. (2) 3 Agra High Court Reports, 13.

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[29] The next question is whether the mortgage is binding on the son in respect of his share. It is argued for the appellant that, the father having borrowed money not prior to the mortgage but only at the time of the mortgage, the debt cannot be considered to be an antecedent debt so as to come within the rule in the Privy Council case *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1). This is the view taken by this Court in *Srinivasa Ayyangar* v. *Ponnammal* (2) and *Chinnayya* v. *Perumal* (3). The respondent refers us to the case reported as *Khalilul Rahman* v. *Govind Pershad* (4) in which it was held that even in circumstances such as those of the present case, the mortgage will be enforced against the son's share as well as against that of the father. We do not find any sufficient grounds for differing from the rule hitherto followed by this Court, *viz.*, that in order to justify a sale or a mortgage by a father so as to bind the son's share, there must be, in fact, an antecedent debt, *i.e.*, a debt, prior to the mortgage or sale.

We must, therefore, allow the appeal with costs, and modify the decree of the Lower Appellate Court accordingly, but this will not affect the right of the plaintiff to proceed against the son's share in execution of the decree, treating it as a mere money decree. We make no order as to costs in the Lower Appellate Court.

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**21 M. 29.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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ABDUL RAHIMAN AND OTHERS (*Plaintiffs*), *Appellants v.* MAHOMED KASSIM (*Defendant*), *Respondent.**

[6th August, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Sections* 244, 337 *(a)—Order directing the release of judgment-debtor—Appeal.*

A judgment-debtor, who had been arrested in execution of a decree of a District Munsif, made an application for his release under Civil Procedure Code, Section 337 (*a*); and his application was granted :

*Held*, that an appeal lay against the order granting the application.

[30] APPEAL against the order of W. J. Tate, District Judge of Salem, in appeal No. 161 of 1894, which was preferred against the order of J. M. Nallasami Pillai, District Munsif of Tiruppattur, made on execution petition No. 161 of 1894.

The petitioner was the judgment-debtor in original suit No. 681 of 1888, and he applied under Sections 337 and 337 (*a*) for an order directing his release and staying the execution of the decree, pending a second appeal which had been preferred to the High Court. The District Munsif made an order directing the applicant's release under Civil Procedure Code, Section 337 (*a*). The decree-holder appealed to the District Judge, who held that no appeal lay.

The decree-holder preferred this appeal to the High Court.

*Seshagiri Ayyar*, for appellant.

*Sivasami Ayyar*, for respondent.

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* Appeal against Appellate Order No. 1 of 1897.

(1) 5 C. 148. (2) Letters Patent Appeal No. 12 of 1893, unreported.
(3) 13 M. 51. (4) 20 C. 328.

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JUDGMENT.

Though the order of the District Munsif was passed under the authority given to him by Section 337 (*a*), Civil Procedure Code, yet it was none the less an order in a question arising between the parties to the suit and relating to the execution of the decree so as to fall within Section 244 (*c*), Civil Procedure Code. Such order is a decree under Section 2 of the Code, and is therefore open to appeal.

We must, therefore, set aside the order of the District Judge, and remand the appeal for disposal on the merits. Costs will abide and follow the order of the Lower Appellate Court.

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21 M. 30.

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.*

BOJJAMMA (*Plaintiff No.* 2), *Appellant v.* VENKATARAMAYYA AND ANOTHERS (*Defendants*), *Respondents.**
[9th April, 1897.]

*Negotiable instrument—Benami transaction—Right of benamidar to sue.*

The payee and holder of a promissory note is not debarred from suing on it by reason of the fact that a third person is really interested in it.

[Appr., 30 M. 88=16 M.L.J. 508=1 M.L.T. 377 (F.B.); R., 28 M. 205=15 M.L.J. 249; 10 O.C. 263; D., 30 M. 245=17 M.L.J. 174.]

[31] SECOND appeal against the decree of W. G. Underwood, District Judge of Cuddapah, in appeal suit No. 24 of 1895, affirming the decree of V. G. Narayana Ayyar, District Munsif of Cuddapah, in original suit No. 603 of 1893.

This was a suit on a promissory note executed by defendant No. 1 to plaintiff No. 1 for Rs. 448, dated 14th November 1890. The plaintiff stated that the money was advanced by one Chintapalli Kristnavadhanulu, though the note was in his name.

Both the Courts dismissed the suit.

Plaintiff No. 2 appealed.

*Subramania Ayyar*, for appellant.

*Etiraja Mudaliyar*, for respondents.

JUDGMENT.

It is not quite clear that this really was a benami transaction; but, assuming that it is we do not think that the payee and holder of a promissory note is debarred from suing on it by reason of the fact that a third person is really interested in it. No doubt it has been often held in suits relating to land that a benamidar is not competent to sue in his own name. But there is a great distinction between cases of that sort and the case of negotiable instruments. The distinction between suits relating to immoveable property and suits on contracts appears to be recognized by the Privy Council (*Gopeekrist Gosain* v. *Gungapersaud Gosain* (1) and *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar*(2). In the case of

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* Second Appeal No. 490 of 1896.

(1) 6 M.I.A. 53 (72). (2) 16 C. 364.

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negotiable instruments especially it would be most mischievous in our opinion to hold that the holder and payee of an instrument may be put to proof as to whether the money advanced was his own. We can find no reported authority in favour of the plea now suggested. We entirely disagree with the unreported decision in *Ganapati Naicken* v. *Saminatha Pillai* (1).

We must reverse the decrees of the Courts below and the plaintiff must have a decree against the first defendant as prayed with costs throughout.

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**21 M. 32=7 M.L.J. 238.**

## [32] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

POKREE SAHEB BEARY (*Plaintiff*), *Appellant v.* POKREE BEARY AND ANOTHER (*Defendants Nos.* 1 *and* 2), *Respondents.** [21st July, 1897.]

*Transfer of Property Act—Act IV of* 1882, *Section* 72—*Mortgage accounts—Costs incurred by mortgagee.*

Land, having been mortgaged to the defendant, was left by him for rent to the mortgagor. The rent fell into arrear and the mortgagee sued and obtained a decree for the rent in arrear and for possession. Subsequently, after the mortgagor's death, her heir, the present plaintiff, unsuccessfully resisted execution of the decree obtained against her, asserting that she had no right to mortgage the property which, it was alleged, had belonged to his father. The plaintiff now brought a suit for redemption :

*Held*, that in taking the account the defendant was entitled to have credit for the costs incurred in the proceedings between him and the plaintiff, but not in the proceedings between him and the original mortgagor.

[R., 30 M. 426 (P.C.)=4 A.L.J. 625=9 Bom. L.R. 1104=6 C.L.J. 379=11 C.W.N. 1005=17 M.L.J. 444.]

SECOND appeal against the decree of W. C. Holmes, District Judge of South Canara, in appeal suit No. 7 of 1894, modifying the decree of S. Raghunathayya, District Munsif of Mangalore, in original suit No. 20 of 1892.

The plaintiff sued to recover possession of land which had been mortgaged by his mother and predecessor in title to the defendant. The suit was treated as a redemption suit, and the chief question was as to whether, in taking the mortgage account, the mortgagee was entitled to credit for the costs of certain litigation. The circumstances relating thereto were stated by the District Munsif as follows :—

"Pathumma appears to have obtained back on chalgeni the entire "property mortgaged to first defendant (*vide* Exhibits II and V). In "1884 first defendant sued plaintiff's mother to recover possession of the "said mortgaged property with arrears of rent, and also future rent, and "got a decree (*vide* Exhibit V). In executing this decree, first defendant was "resisted by plaintiff, who contended that the property was his father's, "but his contention was disallowed, the property being held to be his "mother [33] Pathumma's property (*vide* Exbibts V and VII, the judg- "ments in the Court of First Instance and in Appellate Court, respectively

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* Second Appeal, No. 482 of 1896.

(1) Civil Revision Petition No. 578 of 1895 unreported.

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"the latter of which had been passed on 9th September 1886). At about "the close of 1887, first defendant appears to have applied for execution of "his decree by arresting the plaintiff, son of Pathumma, who was then "dead; but the Court appears to have declined to arrest him, until after "the attachment and sale of debtor's property should take place."

The present appeal was preferred by the plaintiff.

*Pattabhirama Ayyar*, for appellant.

*Narayana Row*, for respondents.

JUDGMENT.

The Lower Court have properly held that Exhibit III is not binding upon the plaintiff, and that the first defendant is not therefore entitled to the sum therein mentioned.

The next question is whether the first defendant is entitled to all or any of the sums allowed by the District Judge as payable by the plaintiff before he can recover possession of the mortgaged property. The sums are claimed as due in respect of costs incurred by the first defendant in certain suits (Exhibit, V, VI and VII). The sum in Exhibit V represents costs incurred by first defendant in a suit for rent due by the original mortgagor, as a tenant of the first defendant. The tenancy was created subsequent to the mortgage, and the rent was not made a charge on the property by the contract between the parties. Moreover, the decree in the suit was only a personal decree. In these circumstances, we are unable to hold that these costs were incurred for the due management of the property, and the collection of the rents within the meaning of Section 72 (*a*) of the Transfer of Property Act, 1882. To hold otherwise would, in many cases, enable the mortgagee to recover from the mortgagor the expenses incurred by the former in attempting to recover rents from tenants put into possession by himself. Should such tenants fail to pay, there is no reason why the mortgagor should be responsible for the expenses of the litigation, unless, of course, he has entered into any contract with the mortgagee to be responsible. The fact that, in the present case, the mortgagor is the tenant can make no difference in principle, since she was sued as tenant, not as mortgagor. The first defendant is not entitled to make these costs a charge on the property. As regards the costs incurred in the other suit to which Exhibits VI and VII relate, we observe that in that suit the mortgagor's title **[34]** was impeached by the present plaintiff, and the costs were incurred by the first defendant, the mortgagee, in defending the mortgagor's title. Such costs are clearly within the rule in Section 72 (*c*) of the Transfer of Property Act.

The law to this effect was laid down long ago in *Godfrey* v. *Watson* (1) and *Parker* v. *Watkins* (2) is no exception to the rule. For all that was there decided was that "if some litigious person chooses to contest "his (the mortgagee's), title to the mortgage, that should not affect the "parties interested in the equity of redemption." The Vice Chancellor, "however, expressly observed that "where a mortgagee has been put to "expense in defending the title to the estate, the defence being for the benefit "of all parties, he is entitled to charge those expenses against the estate."* The latter is precisely the present case.

The District Judge was therefore right in allowing these costs.

* P. 137, ED.

(1) 3 Atk. 517. (2) John 133.

The District Judge has not given any finding as to the amounts to be allowed with reference to the repairs of the embankment and the trees cut, but the sum is trifling, and the respondents' vakil does not press to have the case sent back for a finding on these matters.

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Both parties have, to some extent, failed to establish their respective contentions.

We shall, therefore, allow the first defendant only half the costs throughout. The plaintiff must bear his own.

The decree for redemption will be modified in accordance with these findings, and the time for redemption will be three months from this date.

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**21 M. 35.**

## [35] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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ACHUTA MENON (*Plaintiff*), *Appellant v.* ACHUTAN NAYAR AND OTHERS (*Defendants*), *Respondents.**
[25th and 30th April, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Section* 373—*Suit withdrawn without liberty to bring a fresh suit—Subsequent suit for the same matter.*

In 1893 the plaintiff sued to eject the defendants alleging that they were in occupation of the land in question under a lease of 1880 from the late Zamorin of Calicut. The plaintiff's title rested on an instrument executed by him in 1892. It was objected that the instrument was not binding after the death of the grantor. The plaintiff thereupon withdrew his suit without obtaining leave to sue again. He subsequently obtained a like instrument from the present Zamorin and sued again to eject the defendants :

*Held*, that the second suit was not maintainable by reason of Civil Procedure Code, Section 373.

[F., 8 Ind. Cas. 1066 (1067) = 9 M.L.T. 468 = (1910) M.W.N. 782 ; R., 9 O.C. 164 ; 1 P.R. 1904 = 41 P.L.R. 1904.]

SECOND appeal against the decree of J. A. Davies, District Judge of South Malabar, in appeal suit No. 245 of 1895, reversing the decree of P. Raman Menon, District Munsif of Nedunganad, in original suit No. 495 of 1893.

Suit for land. The facts of this case as far as material for the purposes of this report were stated by District Munsif as follows :—

"The lands are the jenm of the fifteenth defendant and are held by "defendants on Tiruvezhutu right. Plaintiff obtained a melcharth from "the fifteenth defendant's predecessor and sued on it in original suit "No. 189 of 1893. The fifteenth defendant denied the validity of the "melcharth on the ground that the melcharth was given before the "expiry of the term and by the time the term expired the grantor "of the melcharth died. Plaintiff then applied for permission to with-"draw the case with leave to sue again. The suit was allowed to be "withdrawn, but the leave to sue again was refused. Plaintiff then "obtained a fresh melcharth from fifteenth defendant and sues. Defend-"ants contend that the suit is barred by the provisions of Section 373, "Civil Procedure Code. I do not think the contention is good. No "doubt both suits are upon the same [36] demise, but it must

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* Second Appeal No. 772 of 1896.

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"be remembered that plaintiff's right to bring the former suit was different from the one on which this suit is based. If, for instance, the "plaintiff's former suit had been dismissed on the ground that the melcharth was invalid, would the fifteenth defendant be barred from recovering the lands in a fresh suit? I think not, and I do not see why plaintiff "should be barred from suing on a melcharth given by the fifteenth "defendant. Since the authority on which the plaintiff now sues is "different from the one on which the former suit was brought, the provisions of Section 373, Civil Procedure Code, are not applicable. The "accident of the same man being plaintiff in both cases, cannot bar the "second suit inasmuch as the right on which the former suit was brought "was different from the one now alleged. I find the seventh issue for "plaintiff."

The District Munsif passed a decree as prayed.

The District Judge reversed his decree on the ground that the suit was barred under Section 373, Civil Procedure Code. He said:—"In "this case the plaintiff here had been the plaintiff in original suit No. 189 "of 1893, which was a suit for ejectment against the same defendants "as in this suit and upon the same lease, and he withdrew that suit "without permission of the Court. The only difference here is that the "melcharth which clothes plaintiff with the right of suit is not the same "melcharth upon which he is entitled to bring the former suit. The cause "of action is the same, but the plaintiff's particular right to sue is based "on a different document. The individual is the same, but he has put on "new apparel for old apparel. It seems to me clear that the words "'the plaintiff' in Section 373 must refer to the individual, and that a "penalty is intended for that particular person who sets a Court of Law "in motion and then wantonly stops the machinery. He is not to "be allowed to sue in Court again in any guise for the same matter. "That the matter is the same here as in that suit is not disputed, "and the person suing now is the same individual who was plaintiff in "that suit."

The plaintiff preferred this second appeal.

*Sankaran Nayar* and *Ryru Nambiar*, for appellant.

*Sundra Ayyar* and *Govinda Menon*, for respondents.

## JUDGMENT.

[37] Prior to the institution of the present suit, the plaintiff had instituted another, *viz.*, original suit No. 189 of 1893, against these same defendants who are contesting this suit. In that suit he sought to compel these defendants to surrender certain plots of land on receiving from him the value of improvements, if any, made by them. He then alleged that the said defendants held the lands as tenants under the lease of the 10th October 1880, which was to enure for twelve years and which was granted to the first defendant by the late Zamorin, to whose 'stanom' or dignity the lands are attached. As to the right to claim the surrender of the lands, the plaintiff relied on a demise by the same Zamorin, dated 28th July 1892. The present Zamorin, who was also one of the defendants in the case, contended that the demise of the 28th July 1892, was not granted under circumstances which, in law, rendered it binding on him as the present holder of the stanom. The present contesting defendants denied their liability to surrender the lands, and alleged that the tenancy under which they held was a permanent one, or that they were entitled to hold for a further period.

The plaintiff on or about the 12th December 1893 withdrew the suit without leave to sue again. Having, however, on the 16th idem obtained a demise from the present Zamorin himself, the plaintiff brought this suit for the surrender of the same properties alleging it, in this suit also, to be in the occupation of the defendants under the lease of 10th October 1880 relied on by the plaintiff in the prior suit.

The Lower Appellate Court was of opinion that the plaintiff was precluded by Section 373 of the Civil Procedure Code from maintaining the present suit, and it was accordingly dismissed. It was urged before us on behalf of the plaintiff that the Lower Appellate Court was wrong in holding that the present suit was for the 'same matter' within the meaning of Section 373 of the Civil Procedure Code as that involved in the previous suit, and that consequently that section ought not to be held applicable.

Now the term 'matter' in a context like that in the above mentioned section means clearly "the subject of legal action, consideration, complaint or defence or the fact or facts constituting the whole or a part of a ground of action or defence". (See Anderson's 'Dictionary of Law'.) The point, then, for determination is whether there exists in the present instance the identity [38] of 'matter' required by law in order to make the section applicable.

Now, taking first for convenience sake the defence or the facts constituting the basis of the right set up by the contesting defendants, the case is doubtless the same now as it was in the earlier suit.

Turning next to the nature of the plaintiff's claim or the facts constituting the basis of his right and its infraction, or, in short, his cause of action, it is equally clear that there is identity at all events with regard to that portion thereof which relates to the alleged liability of the defendants to surrender the lands, since the contract by virtue of the provisions of which it was alleged they had to surrender the property is one and the same, *viz.*, the lease of 10th October 1880 granted by the late Zamorin. As to the remaining portion of the plaintiff's own case, no doubt, there is some difference, inasmuch as the demise relied on in the former suit was one granted by the late Zamorin, while that now relied on is one granted by the present Zamorin. The question whether, in these circumstances, the matter constituting the cause of action is the same or different is one of considerable difficulty, and must depend on the facts of the two suits as pointed out by West, J., in *Girdhar Manordas* v. *Dayabhai Kalabhai*(1)—a case relating to Section 13 of the Civil Procedure Code, in which section also the term 'matter' seems to be used in the sense explained above. In that case West, J. observed that the authorities cited therein showed that "where there has been a real separateness of the legal relations and of the evidence necessary to establish it in two successive suits between the same parties, the second is not barred by the first" (*Girdhar Manordas* v. *Dayabhai Kalabhai* (1). In *Shridhar Vinayak* v. *Narayan Valad Babaji* (2) the same learned Judge expressed himself in connection with that very point thus: "The matter must be regarded as essentially different when it did not originate in the same transaction and when it constituted, as averred, a wholly different right in the plaintiff giving rise to a different duty on the part of the defendant," or again, as West, J. himself put the question in another aspect of it in *Naro Hari* v. *Anpurnabai* (3), "the cause of action is to be regarded as the same if it rests on facts which are integrally

(1) 8 B. 174. (2) 11 B.H.C.R. 224. (3) 11 B. 160

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"connected [39] with those upon which a right and infringement of the "right have already been once asserted as a ground for the Court's interference" and *Haji Hasam Ibrahim* v. *Mancharam Kaliandas* (1). What is the conclusion which the facts in the present case suggest in the light of the above statements of the law? Now, in the present, as well as in the previous suit, the allegation that the defendants held under the self-same lease of 1880 was an essential part of the plaintiff's cause of action. Consequently in our opinion, it cannot properly be said that there is no integral connection whatever between the plaintiff's allegations in the two suits, that there is a *complete* difference between the cause of action alleged before and that alleged now, and that the transaction of 1893 between the plaintiff and the present Zamorin, which is the only distinguishing circumstance relied on, imposed on the defendants a duty wholly or to any extent different from that to which they were subject before that transaction took place. It follows, therefore that that part also of the matter in issue in the two suits which had or has reference to the plaintiff's case by itself is substantially the same within the meaning of the authorities cited above, and Section 373 must therefore in our opinion, be held to be applicable. Suppose, however, that the plaintiff's cause of action in the previous suit was different from that in the present suit. Nevertheless, the suit must be held to be unsustainable for the simple reason that the identical defence raised by the contesting defendants in the two suits is of such a nature as would, if it had been established in the previous suit, have precluded the plaintiff from maintaining this suit even on the demise of 1893. It is scarcely necessary to say that one of the objects of Section 373 is to protect a defendant from being harassed by repeated litigation with reference not only to the allegations constituting the plaintiff's case, but also as to those which constitute the defence or any part of it. The defendants here are, therefore, under the section in question, entitled successfully to contend that the plaintiff having once, without obtaining the necessary leave, withdrawn from the contest respecting the tenancy set up by them is now prevented from agitating that question in this suit, or, in other words, his claim completely fails.

For these reasons, agreeing with the conclusion arrived at by the Lower Appellate Court, we dismiss the second appeal with costs.

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21 M. 40.

## [40] APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

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ARUNAGIRI MUDALI (*Defendant*), *Appellant v.* RANGANAYAKI AMMAL AND ANOTHER (*Plaintiffs*), *Respondents.**

[28th September, 1897.]

*Hindu Law—Succession—Illegitimate children—Property of mother.*

A Hindu woman having daughters by one paramour and a son by another died leaving a house. The daughters sued for possession of the house in succession to their mother. It was *inter alia* pleaded for the defence that the plaintiffs could not recover the house for the reason that it had been derived from the putative father of the first defendant, but this was not proved :

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* City Civil Court Appeal No. 14 of 1896.

(1) 3 B. 137.

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*Held*, that the plaintiffs were entitled to recover.

*Semble*: that the decision would have been the same even if the allegation on which the above plea was based had been established.

[R., 12 Bom.L.R. 545 (550).]

APPEAL against the decree of P. Sreenivasa Rau, Judge of the City Civil Court, Madras, in original suit No. 37 of 1895.

The plaintiffs were the illegitimate daughters of the mother of defendant No. 1, who was her son by another paramour, and they sued to recover possession of a house to which they claimed to be entitled in succession to their mother. Defendant No. 1 had mortgaged the house to defendant No. 2. It was sought to be proved for the defence that the mother had derived the property from the putative father of defendant No. 1, and that the mortgage to defendant No. 2 was in any event binding upon the interest of the plaintiffs, because the amount secured thereby had been advanced from time to time for purposes binding on them. The latter contention forms the subject of the fourth issue. Both these points were decided in favour of the plaintiffs to whom the Judge gave the decree.

Defendant No. 2 preferred this second appeal.

*Krishnasami Chetti*, *Sankaran Nayar* and *K. N. Aiya*, for appellant.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*) and *Etiraja Mudaliar*, for respondents.

## JUDGMENT.

**[41]** Two main contentions are urged by the appellant before us. The first is that the money with which Chinnathayammal purchased the house was derived by her from her first paramour, the father of the first defendant, and that, therefore, as a matter of law, the house devolves on the first defendant rather than on the plaintiffs who are the woman's daughters by another paramour. In support of this proposition of law, the appellant's vakil relies on the text in 'Manu,' Chapter 9, Section 191 (see page 369, Max Muller's 'Sacred Books of the East'). The text is as follows:—

"But if two (sons) begotten by two (different men) contend for the "property (in the hands) of their mother, each shall take to the exclusion "of the other, what belonged to his father."

In regard to this we may observe that the section appears to refer not to the devolution of the property of a concubine or prostitute, but rather of a woman married in succession to two husbands, and it is so understood by the commentators Kullukha and Nandana. Moreover it would seem that Section 191 must be read in connection with the section which immediately precedes it, and that it should then be understood not as referring to the self-acquired property of the woman, but to the property of the deceased father of the children in her hands. Thus it would seem that the text has no application to the present case, where the competition is between the daughters of a prostitute by one paramour and her son by another paramour. We do not, however, think it necessary to discuss the legal question more fully, as we are of opinion that the first defendant has not satisfactorily shown that his mother in fact derived the property from his putative father.

The story of the jewels being taken from him when a child is improbable, and there is no documentary evidence, such as might certainly have been expected, to support the allegation of his witnesses that his mother sold a house previously given to her by his father.

For all these reasons the first ground urged before us fails.

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The second ground urged is that the money was borrowed by first defendant as *de facto* manager of the plaintiff's family and was expended for their benefit, and the plaintiff's estate is, therefore, bound by the mortgage. Here again we are unable to find the fact on which the argument depends. Exhibits F, G, and J show that, so long ago as 1887, the first defendant claimed the house as [42] his exclusive property, and his claim was resisted on plaintiff's behalf by their putative father and next friend, and the Collector refused to admit the first defendant's claim. The second defendant by his own admission knew of this contest and doubted the first defendant's title, yet he says he lent on the security of the house. This, we think, is highly improbable.

The only transaction said to be prior to those documents F, G and J is the promissory note (Exhibit II), but we are not satisfied that it was executed on the date it bears or that the money was really paid as recited therein. On the whole we conclude that the decision of the Court below on the fourth issue is right.

Both the grounds urged in appeal having thus failed, we confirm the decree of the Lower Court and dismiss this appeal with costs.

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21 M. 42.

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

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ATHIKARATH NANU MENON AND OTHERS (*Plaintiffs*), *Appellants v.* ERATHANIKAT KOMU NAYAR AND OTHERS (*Defendants*), *Respondents.** [11th August, 1897.]

*Specific Relief Act—Act 1 of* 1877, *Section* 42—*Suit for declaration—Laches and delay on plaintiffs' part.*

Inasmuch as in this country a period of limitation is prescribed even for suits where the grant of relief sought is within the discretion of the Court, mere lapse of time short of the period of limitation should not ordinarily be held a good ground for refusing relief to a plaintiff.

SECOND appeal against the decree of H. H. O'Farrell, District Judge of South Malabar, in appeal suit No. 488 of 1895, reversing the decree of A. Venkataramana Pai, Subordinate Judge of Calicut, in original suit No. 4 of 1893.

The plaintiffs (fifteen in number), who, with the first three defendants, constitute a Marumakkatayam tarwad, sued for a declaration that a mortgage executed in 1889 by the first defendant [43] in favour of one Kunju Menon, the predecessor in title of defendants Nos. 4 to 24, was not binding on the mortgaged properties belonging to the tarwad.

The Subordinate Judge found that the mortgage in question was not binding on the plaintiffs and made the declaration asked for.

Against his decree appeals were preferred to the District Court who dismissed the suit.

The facts found by both Courts were that the property belonged to the tarwad, and had been held since 1867 by the first defendant under a registered karar, which only entitled her to mortgage it for certain specified debts, and that the debts for which the mortgage in question was granted were not those specified. The defendants raised a plea of

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* Second Appeal No. 1639 of 1896.

estoppel and pointed to the plaintiffs' delay in suing. As to this the District Judge said:—

"The Subordinate Judge has himself found that the karnavan and "the senior anandravan of the tarwad, third defendant and first plaintiff "by their conduct led the creditors to believe that they had no objection "to the debt being charged upon the property. It may, doubtless, be, as "the respondents' pleader urges, that the mortgagee having the means at "any rate of ascertaining the provisions of the karar ought to have known "that, as a matter of law, the karnavan and the senior anandravan had "no power to set it aside. It is pointed out, however, that the plaintiffs "were no parties to the karar, and that the cases to which a family karar "has been held not to be liable to be set aside except by all the members "of the tarwad, have been cases in which the karar was executed in order "to restrain the karnavan himself which is not the case here. Here all "the actual parties to the karar were assenting to the mortgage deed. "Without going so far as to say that the case is one to which the legal "doctrine of estoppel strictly applies, I have come to the conclusion that "the Lower Court ought not, in the circumstances, to have granted the "relief sought. The case is an extremely hard one as far as the defendants "are concerned, and there seems little doubt that money was *bona fide* "lent by their ancestor for debts, which, if not strictly within the terms of "karar, were yet either expressly or tacitly allowed by the other members "of the tarwad to be proper and binding debts. As long as the original "mortgagee Kunju Menon was alive, no attempt was made to set [44] aside "the mortgage, but as soon as he was dead, and no longer capable of bearing "testimony as to the circumstances under which the mortgage was created, "this suit is filed against his heirs. A period of not less than four years elaps- "ed from the date of mortgage to the filing of the present suit, and there "were ten years between the date of the suit, and that of the prior mortgage, "which represented nearly one-half of the mortgage amount now in suit."

In the result he reversed the decree and dismissed the suit upon the ground that the plaintiffs had disentitled themselves to equitable relief by reason of their laches.

Plaintiffs preferred this second appeal.

*Ryru Nambiar*, for appellants.

*Govinda Menon*, for respondents.

## JUDGMENT.

The District Judge, although finding that the mortgage was not binding on the plaintiffs, refused to give them a declaratory decree to that effect on the ground of their delay in bringing this suit for four years.

No doubt the grant of the relief herein prayed was within the discretion of the Court, but the question is whether mere delay, so long as the suit is brought within the prescribed period of limitation, was a good ground for withholding the relief to which the plaintiffs were *prima facie* entitled. Inasmuch as in this country a period of limitation is prescribed even for suits where the grant of relief sought is within the discretion of the Court, mere lapse of time short of the period of limitation should ordinarily be held not to be a good ground for refusing relief. Even according to the English decisions, in following which we should be cautious for the reasons pointed out by Frere and Holloway, JJ., in *Peddamuthulaty* v. *Timma Reddy* (1), mere delay is not a sufficient cause. To

(1) 2 M.H.C.R. 270.

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operate as a bar to relief the delay should be such as to amount to waiver of the plaintiffs' right by acquiescence, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted (*Erlanger* v. *New Sombrero Phosphate Company*(1)—*vide* the remarks of Lord Penzance at page 1231 and of Lord Blackburn at page 1279). When such is not the case any lapse of [45] time should not disentitle a claimant to relief to which he has otherwise shown his title.

Of this, the recent case of *Rochefoucauld* v. *Bonstead* (2) is a good illustration. The same principle has been acted upon by the Bombay High Court with reference to mandatory injunctions (*Jamnadas Shankarial* v. *Atmaram Harjivan* (3)). Examining the present case in the light of these observations, we find no adequate ground for holding that there was waiver or such conduct or neglect as would justify us in refusing the plaintiffs the declaration they are otherwise found to be entitled to, nor should it be overlooked that in this case the party through whom the defendants' claim entered into the transaction with his eyes open and at his own risk, as he was aware of the arrangement by which his mortgagor's power was limited. He could, therefore, claim no indulgence.

For these reasons we must reverse the decree of the District Judge and restore that of the Subordinate Judge. The appellants' costs in this and the Lower Appellate Court must be paid by respondents Nos. 1 to 21.

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**21 M. 45.**

## APPELLATE CIVIL.

*Before Mr. Justice Benson and Mr. Justice Boddam.*

GADICHERLA CHINA SEETAYYA (*Plaintiff*), *Petitioner v.* GADICHERLA SEETAYYA (*Defendant*), *Respondent.**
[15th October, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Section* 244 (*c*) —*Party to the suit.*

A defendant who had been exonerated from a suit is not a party within the meaning of Civil Procedure Code, Section 244 (*c*), and a suit by the plaintiff for contribution for his share of the costs of execution is not barred under that section.

[**R.**, 23 A. 346 (354) ; 17 M.L.J. 416 ; **Expl.**, 23 M. 361 (366) (**F.B.**).]

PETITION under Presidency Small Cause Courts Act, Section 25, praying the High Court to revise the decree of N Saminadha Ayyar, Subordinate Judge of Kistna, in small cause suit No. 753 of 1895.

[46] The Subordinate Judge said: "Claim for Rs. 311-15-5 alleged "to be due by the defendant in contribution for his one-sixth share of the "costs of execution incurred by plaintiff in original suit No. 3 of 1867 "on the file of the late Principal, Sadar Amin's Court of Rajahmundry.

"The defendant contends among others that no separate suit lies, as "the matter in question falls within Clause (*c*) of Section 244 of the Civil "Procedure Code.

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* Civil Revision Petition No. 339 of 1896.

(1) L.R. 3 App. Cas. 1218. (2) L.R. 1897, 1 Ch. D. 196. (3) 2 B. 133.

"My finding is in the negative. This defendant was admittedly a "party to the suit in which the decree was passed, and the question whether "this defendant should pay to the decree-holder a portion of the execution "costs is one relating to the execution of the decree. Consequently, Clause "(c) of Section 244 does apply, and no separate suit can be brought. The "decree-holder wanted to get the whole costs from the first defendant, who "undertook to put the decree-holder in possession of his one sixth share, "but failed to do so. The District Judge of Godavari ordered the first de- "fendant to pay the same, but on appeal the Madras High Court held that "the first defendant should be liable only to his one-sixth share of the "costs. But it does not follow therefrom that a separate suit lies for the "remainder of costs."

In result he dismissed the suit with costs.

Plaintiff preferred this petition.

*Sriranga Chariar*, for petitioner.

*Etiraja Mudaliar*, for respondent.

## JUDGMENT.

We think the Subordinate Judge was wrong in holding that the defendant who had been exonerated from the suit was a party within the meaning of Section 244 (*c*) of the Civil Procedure Code, and, therefore, that the plaintiff could not bring a separate suit against him, but was bound to proceed in execution (see *Mukarrab Husain* v. *Hurmatunnissa*(1)).

The fact that the plaintiff's claim arises out of expenses incurred in the course of executing the decree makes no difference. We express no opinion as to the merits of the plaintiff's claim. We, therefore, reverse the decision of the Subordinate Judge and direct him to restore the suit to his file and dispose of it according to law.

The respondent must pay the appellant's costs.

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**21 M. 47=7 M.L.J. 233.**

## [47] APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Benson.*

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DHARANIPRAGADA DURGAMMA (*Plaintiff*), *Appellant* v. KADAMBARI VIRRAZU AND OTHERS (*Defendants Nos.* 1, 2 *and* 4), *Respondents*.* [16th August and 1st September, 1897.]

*Service inams—Enfranchisement of the inam in favour of a widow.*

Lands constituting the emoluments of the office of Karnam were enfranchised in favour of a widow who had been in possession since the death of her husband which took place about 18 years previously. They were subsequently sold by her :

*Held*, that the vendee's title was good against the reversionary heir of the husband.

[**Diss.**, 26 M. 339 ; 30 M. 434=17 M.L.J. 101=2 M.L.T. 101 (**F B.**) ; **F.**, 23 M. 47 ; **R.**, 22 M. 204 ; 27 M. 16; **D.**, 25 M. 424.]

SECOND appeal against the decree of K. Krishna Rau, Subordinate Judge of Cocanada, in appeal suit No. 196 of 1895, reversing the decree

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* Second Appeal No. 1400 of 1896.

(1) 18 A. 52.

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21 M. 47 = 7 M.L.J. 233.

of V. V. S. Avadhani, District Munsif of Amalapur, in original suit No. 668 of 1893.

Suit for land. The plaintiff sued as the daughter and heiress of one Papayya who died about 1853 to recover certain land which had been sold by his widow, Atchamma, who died in 1892, to the defendants. The District Munsif passed a decree as prayed. The Subordinate Judge reversed the decree and dismissed the suit on the ground that the property was the property of the widow. He said:—"The question is whether the land "in dispute belonged to Papayya's widow. Atchamma, in absolute right, "so that the alienation made by her is valid against Papayya's reversioner, the plaintiff. The defendants contend that the lands were "emoluments for Karnam's office until 1870, and were in 1871-72 enfranchised in the name of Atchamma, and that, by this arrangement, the "property became Atchamma's absolutely. Plaintiff's pleader argues that "though, it is true, the lands were service inam and were enfranchised in "Atchamma's name, still she got by such enfranchisement no more than "the widow's estate, which she had been holding ever since her husband's "death some forty years ago. I think this plea is untenable according "to the principle adopted in *Venkatarayadu* v. *Venkataramayya* (1). The "[48] ground of the decision in that case is that the old rights connected "with the land are altogether abrogated by the enfranchisement, and the "person who is constituted owner takes it free from the fetters, if any, "which the property may have been bound by before the enfranchisement. "This is the reason why one of the two undivided brothers having joint "right to the mirasi and the karnamship, would be deprived of both "when the enfranchisement takes place in favour of the other brother. "If one of the two co-parceners who are in actual possession can be so "deprived of his interest, surely a reversioner after a widow's death can "also be.

"The grant of the plaint land in question here to Atchamma was not "a grant for the benefit of the reversioners of her husband, but was a "grant to her 'personally' and she could therefore dispose of the property "as she liked."

Plaintiff preferred this second appeal.

*Narayana Rau*, for appellant.

*Venkatarama Sarma*, for respondent.

## JUDGMENT.

It is contended for the appellant that the decision of the Lower Appellate Court is opposed to the ruling in *Narayana* v. *Chengalamma* (2).

It may perhaps be that the contention is well founded, but it is not necessary for us to consider the question, as it is clear that the decision is in accordance with the decision of the Full Bench in the case of *Venkata* v. *Rama* (3). This decision of the Full Bench was not referred to in the case on which the appellant now relies, and we are bound to follow the ruling of the Full Bench. Under that ruling the widow must be held to have acquired the land under the inam title-deed as her own absolute property by grant from Government. That decision proceeded on the broad ground that the plaintiff did not hold the office of karnam at the time of the enfranchisement and, therefore, had no title to sue for the lands and that the land when enfranchised was at the disposal of Government and alienable to whomsoever the Government pleased. It regarded the inam title-deed

(1) 15 M. 284. (2) 10 M. 1. (3) 8 M. 249.

as evidence of a grant of the land personally to the grantee, and that was the view followed in the case on which the Subordinate Judge relies *Venkatarayadu* v. *Venkataramayya* (1). Following, then, the principle of the Full [49] Bench case we are of opinion that there was an absolute grant by Government to the widow and that the appellant cannot question her alienations. There was no reason why Government should grant her only a widow's estate, rather than an absolute estate.

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21 M. 47= 7 M.L.J. 233.

We confirm the decree of the Lower Appellate Court and dismiss this second appeal with costs.

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21 M. 49=7 M.L.J. 291.

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

TIRUPATHI GOUNDAN (*Plaintiff*), *Appellant v.*
RAMA REDDI (*Defendant*), *Respondent.**
[30th March, 1897.]

*Negotiable Instruments Act—Act XXVI of* 1881, *Section* 4, *promissory note.*

A debtor signed and delivered to his creditor an unstamped document as follows:—"The account executed on . . . by , . . to . . . The "amount which I have this day received from you in cash is Rs. 700. This sum "I am bound to pay you. Therefore adding to this sum interest at 8 annas per "cent. per mensem, I am liable to pay. This is the account in this manner "executed with my consent:"

*Held*, that the document was not a promissory note and was admissible in evidence.

[R., 24 M.L.J. 513 (514)=10 M.L.T. 531=(1911) M.W.N. 380.]

SECOND appeal against the decree of W. J. Tate, District Judge of Salem, in appeal suit No. 47 of 1895, affirming the decree of K. Krishna Ayyangar, District Munsif of Krishnagiri, in original suit No. 56 of 1894.

The plaintiff sued to recover money lent. One of the pleas raised was that the instrument relied upon by the plaintiff in proof of the loan was really a promissory note, and not having been stamped was inadmissible in evidence.

The translation of the instrument in question in paragraph 2 of the judgment of the District Judge was as follows:—"The account executed "on . . by . . to . . The amount which I have this day received "from you in cash is Rs. 700. This sum I am bound to pay you. There-"fore, adding to this (sum) [50] interest at . . . I am liable to pay. "This is the account in this manner executed with my consent."

The District Munsif upheld his plea and ruled that the plaintiff was not entitled to adduce further evidence of the loan, and he accordingly dismissed the suit.

The District Judge on appeal affirmed his decision.

Plaintiff preferred this second appeal.

*Sivasami Ayyar*, for appellant.

Mr. *E. B. Powell*, for respondent.

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* Second Appeal No. 12 of 1896.

(1) 15 M. 284.

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21 M. 49 = 7 M.L.J. 291.

## JUDGMENT.

The question is whether the document of the 2nd February of 1891 relied on by the plaintiff is a promissory note within the meaning of Section 4 of the Negotiable Instruments Act, 1881, or a mere acknowledgment of liability falling under Article 1 of Schedule I of the General Stamp Act, or an agreement.

If it is a promissory note, the suit must fail as rightly decided by the Lower Courts. The correct translation of the document is set out in paragraph 2 of the judgment of the Lower Appellate Court. The only question is whether the words therein "I am liable to pay" can be held to be an "undertaking" to pay within the meaning of Section 4 of the Act. The construction depends on the actual words used rather than what their effect may be as regards the rights of the parties. Examining the document in this light, we are of opinion that the words do not amount to an undertaking to pay, but constitute only an acknowledgment of liability to pay.

The words "I am liable to pay" do not, in fact, mean anything more than the previous words in the document "I am bound to pay" which clearly do not constitute an undertaking to pay.

We must, therefore, hold that the document is not a promissory note and the plaintiff's claim as a suit for money lent is sustainable.

We set aside the decrees of the Courts below and remand the suit for disposal according to law. Costs hitherto incurred will abide and follow the result.

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**21 M. 51.**

## [51] APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

ATHAPPA CHETTI (*Auction-purchaser*), *Appellant v.* RAMAKRISHNA NAYAKAN (*Counter-petitioner No.* 1), *Respondent.**
[5th March, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Sections* 311, 314—*Court sale—Irregularity—Right of holders of other decrees to object.*

A zemindar mortgaged his estate to a Bank and the mortgagee obtained a decree in the High Court, in execution of which it was ordered that the zamindari should be sold village by village. Other persons held money decrees against the zemindar. One of them in execution of his decree had the zamindari put up for sale in one lot, subject to the Bank's mortgage, and with the leave of the Court purchased it himself. The other decree-holders applied to have the sale (which had not been confirmed) set aside on the ground of material irregularity in publishing the sale by which substantial injury was caused to them. The irregularities relied on were that the proclamation was not issued in the prescribed form, and did not state the extent of the property and the revenue assessed on it, or the amount of income derived from it, and no mention was made of the order of the High Court:

*Held*, that the sale should not be confirmed.

APPEAL against the order of W. Dumergue, District Judge of Madura, in civil miscellaneous petition No. 242 of 1895.

This and certain other petitions were preferred under Civil Procedure Code, Sections 311 and 314, by persons holding money decrees against

* Appeal against Order No. 84 of 1896.

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the Zemindar of Guntamanayakanur, who desired to have cancelled the sale of the zamindari which had taken place in execution of a money decree obtained by one Athappa Chetti for Rs. 2, 537 in original suit No. 65 of 1894 on the file of the Subordinate Court of Madura (West). The sale was held subject to a mortgage of the Commercial and Land Mortgage Bank, and the decree-holder, who was the present counter-petitioner No. 1, having obtained leave to bid, became the purchaser for the sum of Rs. 1, 500. The Bank had previously obtained a decree upon the mortgage, in execution of which it had been ordered that the zemindari should [52] be sold village by village. On the close of the first day of the sale held in execution of the decree of the Subordinate Court, the Central Nazir reported that there were no bidders except the first counter-petitioner, who made a bid of Rs. 1,500, and the sale was ordered to be continued next day. This was done, but no other bidders appeared, and the sale was closed. On both days the second counter-petitioner's agent, one Makka Ravuthan, was present. On the third day, that is to say, on the 3rd October 1895, after the sale, the first counter-petitioner executed an agreement in favour of the Zemindar of Doddapanayakanur, who is related to the judgment-debtor. In this agreement the first counter-petitioner stated that he has received from the Zemindar of Doddapanayakanur the sum of Rs. 1,500 deposited as the purchase money for the zemindari and "undertakes on "the confirmation of its sale to reconvey or transfer the zemindari at the "cost of the Zemindar of Doddapanayakanur to any person the said "zemindar may name, without the slightest stipulation even as to the "balance of the decree amount." This agreement was attested by Makka Ravuthan, the judgment-debtor's agent, who was present at the Court sale.

The District Judge set aside the sale making *inter alia* the following observations ;—

"The petitioners being entitled to rateable distribution, have the right "to apply under Section 311 to set the sale aside on the ground of material "irregularity (*Lakshmi* v. *Kuttunni*(1)), and it has therefore to be seen whe-"ther there was any material irregularity in publishing the sale, no irregu-"larity in conducting it having been alleged. Then as to the proclamation "of sale framed on information supplied by the judgment-creditor, the form "prescribed required that the extent of the property to be sold and the re-"venue or rent assessed on the land shall be specified. But neither of "these particulars was given in the present instance, and the proclamation "itself was not issued in the form required by the High Court—*Vide* page "64, Part II, Civil Rules of Practice. Moreover, the last column of the "proclamation ought to contain any other facts material to be known relat-"ing to the property, and I think there is no doubt that the fact of the High "Court having, in separate proceedings, ordered the zemindari to be sold [53] "village by village was a very material fact which should have been "mentioned together with particulars of the income derived from the "zemindari in gross and in lots. All these points were ignored, and the "application for the sale of the whole estate in one lot practically gave the "go-by to the orders of the High Court. Intending purchasers would in-"evitably feel apprehensive as to the legal effect of a sale in gross by a "District Court when the High Court had ordered the sale to be in separate "lots, and their apprehension would be increased by all allusion to the order "of the High Court being suppressed. The omission to notify the facts

(1) 10 M. 57.

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"which I have now mentioned was, in my opinion, a material irregularity "which has resulted in substantial injury to the petitioners."

The purchaser preferred this appeal.

*Pattabhirama Ayyar, Sundara Ayyar* and *Sesha Chariar*, for appellant.

Respondent was not represented.

JUDGMENT.

We agree with the District Judge that there were material irregularities in publishing the sale and that these irregularities caused substantial injury to the respondents, who are decree-holders, within the meaning of Section 311, Civil Procedure Code, (*Lakshmi* v. *Kuttunni*(1)).

We, therefore, dismiss the appeal.

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21 M. 53.

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Benson.*

CHOKKALINGA NAICKEN (*Plaintiff*), *Appellant v.* MUTHUSAMI NAICKEN AND OTHERS (*Defendants*), *Respondents.**
[9th August, 1897.]

*Limitation Act—Act XV of* 1877, *Schedule II, Articles* 142, 144—*Adverse possession—Acts of ownership.*

The defendant had used as a backyard a small piece of land situated between his house and that of the plaintiff, who was his brother, for a period of more than [54] twelve years. In 1894 the defendant began to build on it, whereupon the plaintiff protested and now sued for possession :

*Held*, that the suit was not barred by limitation.

[R., 113 P.L.R. 1913=112 P.W.R. 1913.]

SECOND appeal against the decree of W. Dumergue, District Judge of Madura, in appeal suit No. 3 of 1896, reversing the decree of S. Ramasami Ayyengar, District Munsif of Madura, in original suit No. 342 of 1895.

Plaintiff sued to recover a small piece of land. The defendants raised *inter alia* a plea of limitation. The District Munsif passed a decree for plaintiff. The District Judge, on appeal, held that the suit was barred. He said :—"It has to be decided whether the plaintiff was, as he alleges, "dispossessed only in 1894, or whether the suit is barred by limitation. "The facts are that the plaintiff built a house on the disputed site, that "the house was burned down in 1876, that the plaintiff had migrated to "Sivagunga shortly before the fire, that the house-site has been vacant "since the fire and that the first defendant came out of jail in 1878, built "a house on the sixth defendant's portion of land about 1880, and has "since then used the disputed site as his backyard.

"Here, there is no doubt that the first defendant has been in possession of the disputed land for more than twelve years on his own behalf, "and not on behalf of the true owner, the plaintiff, and has used the land "as an appurtenance of his house. In *Framji Cursetji* v. *Goculdas Madhowji* "(2) it was held, upon the facts, that there had been no user intended

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* Second Appeal No. 1170 of 1896.

(1) 10 M. 57. (2) 16 B. 338.

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"to denote or understood as denoting a claim to ownership, but here "the first defendant clearly intended to claim ownership. It cannot "be supposed that the plaintiff was ignorant of the fact that the first "defendant had occupied the land, and I would, therefore, hold that his suit "is barred under Article 144 of the second schedule of the Indian Limitation Act. But that article applies only when there is no other article "which specially provides for the case, and this case is, in my judgment, "specially provided for by Article 142. Mere absence of possession by the "plaintiff would, of course, not be sufficient to bar his suit, because 'the "statute applies not to cases of want of actual possession by the plaintiff, but "to cases where he has been out, and another in, for the prescribed time' "[55] (per Parke, B. *Smith* v. *Lloyd* (1)), and the term discontinuance "of possession, used in Article 142, means abandonment of possession "by one person followed by the actual possession of another person. "This is precisely the state of things in this case. And in *Mohima* "*Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (2), the Privy Council "held that a case in which the plaintiff alleges that he was dispossessed "and sues to recover possession, falls within Article 142 and that, in "such a case, the plaintiff must show that he has had possession within "twelve years before suit. The present plaintiff has not shown such "possession, and I am of opinion that the suit is barred by limitation "under Article 142. For these reasons I must reverse the Lower Court's "decree and direct that the suit be dismissed with costs throughout."

The plaintiff preferred this second appeal.

*Desikachariar*, for appellant.

*Seshachariar*, for respondents.

## JUDGMENT.

We are unable to agree with the District Judge that the principle in the Calcutta case quoted by him is applicable to the present case.

There the suit was for a large area of land paying rent. Here the suit is for a few square yards of vacant land used as vacant house-site or backyard in a town. The acts necessary to establish adverse possession in the two cases are very different. The use of the land by the defendant for the purposes of a backyard would not, under the circumstances, be sufficient to constitute adverse possession, especially when it is remembered that the parties are brothers. The case reported as *Framji Cursetji* v. *Goculdas Madhowji* (3) is in point. Plaintiff having the title to the land must be held to have been in possession until first defendant began to build on it in 1894. Plaintiff then immediately protested and brought this suit in 1895. Plaintiff's suit is not barred by limitation.

We must reverse the decree of the District Judge and restore that of the District Munsif with costs throughout in favour of plaintiff.

(1) 9 Exch. 562. (2) 16 C. 473. (3) 16 B. 338.

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21 M. 56.

21 M. 56.

## [56] APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.*

RANGA AYYAR (*Plaintiff No.* 1), *Appellant v.* SRINIVASA AYYANGAR (*Defendant*), *Respondent.** [6th April, 1897.]

*Vendor and purchaser—Want of consideration for deed of sale—Evidence that a deed is not intended to have the ordinary operation.*

The plaintiffs sued for certain land which they claimed in succession to Rathai Ammal deceased. The defendant who was in possession had executed a sale-deed, comprising the property now in question, in favour of the deceased. But it was pleaded by him and found by the Court of first appeal that the sale-deed was *benami*, and no consideration had passed, and a decree was passed dismissing the suit :

*Held, on second appeal,* that the decree should be reversed.

*Per curiam* : When a conveyance has been duly executed and registered by a competent person, it requires strong and clear evidence to justify a Court in holding that the parties did not intend that any legal effect should be given to it. It needs to be proved that both parties had it in their minds that the deed should be a mere sham, and in order to establish this proof, it needs to be shown for what purpose other than the ostensible one the deed was executed.

[Appr., 1 M.L.T 432; R., 32 M. 325=4 Ind. Cas. 507 (508)=17 M.L.J. 386=4 M.L.T. 279 ; 5 M.L.T. 255.]

SECOND appeal against the decree of D. Broadfoot, Acting District Judge of Trichinopoly, in appeal suit No. 9 of 1895, reversing the decree of A. Ramalingam Pillai, District Munsif of Srirangam, in original suit No. 240 of 1893.

Plaintiffs Nos. 1 and 2 were the brothers of one Krishnayyan deceased, and plaintiffs Nos. 3 and 4 were the sons of another brother. Krishnayyan died fifteen years before the suit, leaving a widow Rathai Ammal, the daughter of the defendant. In February 1888, the defendant executed a sale-deed in respect of the property now in question in favour of Rathai Ammal and her mother Ammani Ammal. The mother predeceased Rathai Ammal who died two years before the suit. The plaintiffs claimed to be entitled to the property under the Law of Succession. The defendant pleaded that the sale-deed was a nominal one and conveyed no rights on the vendees.

[57] Issues 1 to 3 were as follows :—

Whether the sale by defendant is true (or colorable) ?

Whether Rathai Ammal and Ammani Ammal enjoyed ?

Whether plaintiffs are their heirs and entitled to the property ?

The District Munsif said, " I think it probable that the sale-deed was not a document thoroughly devoid of consideration, and I find that the vendees derived ownership to the property conveyed to them thereby," and in the result passed a decree in favour of plaintiff.

The District Judge on appeal held that the sale-deed was *benami*, and that the property never left defendant nor passed to Ammani Ammal or Rathai Ammal and he reversed the decree and dismissed the suit.

Plaintiff No. 1 preferred the second appeal.

*Sundara Ayyar*, for appellant.

*S. Subramania Ayyar*, for respondent No. 1.

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* Second Appeal No. 438 of 1896.

*R. Subramania Ayyar*, for respondent No. 2.
*Pattabhirama Ayyar*, for respondents Nos. 3 and 4.

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JUDGMENT.

The District Judge's finding that the transaction was *benami* and his reason for it do not commend themselves to us.

Presumably he means to find that Srinivasa Ayyangar, when executing the sale-deed (Exhibit I), never intended it to have any operation and he relies on the fact that Srinivasa Ayyangar remained in possession, did not have the patta transferred and retained the instrument of sale. He also refers to the fact that no valuable consideration passed.

We are of opinion that these circumstances afford no evidence of the supposed intention of Srinivasa Ayyangar, when considered in connection with the relationship of the parties and the previous circumstances. On the contrary, those circumstances are all consistent with the intention on the donor's part, which is otherwise clearly established, to benefit his wife and daughter and to save the property from falling into the hands of his next heir who was his enemy. But for the fact that his wife and daughter predeceased him, he would never have disputed the validity of the deed.

We must observe that when a conveyance has been duly executed and registered by a competent person, it requires strong and clear evidence to justify a Court in holding that the parties did not **[58]** intend that any legal effect should be given to it. It needs to be proved that both parties had it in their minds that the deed should be a mere sham, and in order to establish this proof it needs to be shown for what purpose other than the ostensible one the deed was executed. In our opinion, there was in the present case no such proof and, therefore, the Lower Appellate Court ought not to have reversed the judgment of the District Munsif.

The Lower Appellate Court not having decided the third issue, which was also raised in the third ground of appeal, namely, as to the right of the plaintiffs to represent the two donees, we must call for a finding on that question.

The finding is to be submitted within one month from the date of the re-opening of the Court after the recess. Seven days will be allowed for filing objections after the finding has been posted up in this Court.

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**21 M. 58=8 M.L.J. 9.**

## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Boddam.*

MUTHAPPUDAYAN AND ANOTHER (*Defendants Nos.* 1 *and* 2), *Appellants v.* AMMANI AMMAL (*Plaintiff*), *Respondent.**
[21st September, 3rd and 23rd November 1897.]

*Hindu Law—Law of Succession—Stridhanam property—Right of daughter to succeed.*

In a suit for land it appeared that it had been given to one Sellayi, deceased, after her marriage by her father. The donee died leaving her brother, defendant No. 1, her son (since deceased) the husband of defendant No. 2, and the plaintiff, her daughter. Defendant No. 1 was in joint possession on behalf of defendant No. 2.

*Held*, that the plaintiff was entitled to the land.

[R., 29 M. 358=1 M.L.T. 68.]

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* Second Appeal No. 488 of 1897.

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SECOND appeal against the decree of K. Ramachandra Ayyar, Subordinate Judge of Salem, in appeal suit No. 97 of 1896, affirming the decree of V. K. Desikachariar, District Munsif of Namakkal, in original suit No. 241 of 1895.

The plaintiff sued to recover certain land in succession to her deceased's mother, Sellayi. The land had been given to Sellayi [59] by her father Nallappa, after her marriage, and she died in 1876, leaving her son, Namappa, and her daughter, the plaintiff, both minors. The son died shortly before the suit, leaving defendant No. 2, his widow, who was the daughter of defendant No. 1, the brother of the original donee.

The District Munsif passed a decree for plaintiff, which was affirmed on appeal by the Subordinate Judge.

Defendants Nos. 1 and 2 preferred this second appeal.

*Sivasami Ayyar*, for appellants.

*Sundara Ayyar*, for respondent.

## JUDGMENT.

Certain property was given to one Sellayi by her father after her marriage. She died leaving a son and a daughter her surviving. Both the Courts below have held that the plaintiff, who is the daughter of Sellayi, was entitled to the inheritance to the exclusion of her brother.

The rule of succession for such a case is clearly stated in the Mitakshara. The author, after mentioning the various sorts of woman's property recognized by Manu and others, and referring particularly to gifts made after marriage, proceeds to discuss the distribution of such property. "In all forms of marriage," he says, "if the woman leave progeny, that is, if she have issue, her property devolves on her daughter or her daughters." Then he explains the matter further, declaring that unmarried daughters are to take first, but on failure of them, married daughters. He cites Gautama as an authority: "A woman's property goes to her daughters unmarried or unprovided." Then he gives the exception from the rule. "But this is exclusive of the fee or gratuity. For that goes to brothers "of the whole blood, conformably with the text of Gautama: 'The sister's "'fee belongs to the uterine brothers after the death of the mother.'" (Chapter II, Section 11, verse 14.) In the woman's property governed by the general rule is included that which is bestowed after marriage. And thus if the authority of the Mitakshara is to prevail, judgment has been rightly given in the plaintiff's favour whether or not the gift in this particular case is correctly denoted by the name Anvadheya.

Looking to the work of Yajnavalkya which forms the subject of Vijnaneswara's commentary, we find ample foundation for the view taken by him. "After the death of the parents the sons should divide equally "their wealth and debt. The daughters [60] share the residue of 'their mother's property after the payment of her debts, and the issue 'succeed in their default." (Verse 117, Mandlik's translation, page 214.) And again "The property of a childless woman married in the Brahma or "any other of the four approved forms of marriage goes to her husband; in "the remaining four forms of marriage, it goes to her parents. But if she "leave issue, it will go to her daughters." (Verse 145, *ib.* page 224.) Among the Smriti writers there is further in support of the same view the text of Gautama already cited (Chapter XXVIII, verse 24, Sacred Books of the East, Vol. II, page 302) and the text of Vishnu which runs as follows: Chapter XVII, verse 18, "What has been given to a woman by her

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"father, mother, sons, or brothers, what she has received before the sacri-"ficial fire, what she receives on supersession, what has been given to her "by her relatives, her fee (sulka) and a gift subsequent, are called woman's "property (Stridhana)." Verse 19, "If a woman married according to one "of the first four rites, beginning with the Brahma rite, dies without issue, "that (Stridhana) belongs to her husband." Verse 20th, "If she has been "married according to one of the other rites, her father shall take it." Verse "21, "If she dies leaving children, her wealth in every case goes to her "daughter"; (Sacred Books of the East, Vol. VII, pages 69 and 70), and "lastly Narada, Chapter XIII, verse 2, says: Let daughters divide their "mother's wealth; or, on failure of daughters, their male issue." Coming "now to the other commentators whose treatises are current in Southern India, though not carrying the weight which is due to the Mitakshara (Strange's Hindu Law, page 11) we find that it is only in the Smriti Chandrika that a view directly opposed to that already stated is put forward. According to the Sarasvati Vilasa in which the subject is discussed at length it is to the daughters that woman's property is to go; and the same reason is given as is put forward in the Mitakshara (Chapter I, Section 10), "because of the preponderance of the woman's members in the daughters" (Section 138). The exception in the case of sulka is recognized (Section 311; see Section 136, &c., Section 332). The same view seems to be taken in the Madhaviya, so far as gifts from the father and his family are concerned. (See Section 11, page 10, Burnell's translation and Section 50.) The text of Manu, "On the mother's death let all the uterine brothers and sisters "divide equally the maternal wealth" is explained to mean, not that [61] sons and daughters jointly succeed, but that there is to be an equal division if the sons do succeed. A similar construction is put on the text in Sarasvati Vilasa (paragraph 310, page 62). Varadaraja's Commentary is perhaps not quite so clear. Dealing with the same text, after citing the text of Gautama and that of Yajnavalkya, he says with reference to the latter: "In default of daughters the descendants, *i.e.*, sons should take it, such "is the meaning"—and then cites Narada's text. Further, he contrasts yautaka, that which is received by the mother from her family and which the daughters share, with stridhana received from her husband's family. As to this latter he says: "The sons and daughters are equal because of their sapindaship." He draws the same distinction as Madhaviya between what is received from the husband's family and that received from her own family.

So much for the commentaries which have been translated. Dr. Jolly observes that the unpublished Digests of the Mitakshara school agree more or less with the Mitakshara (Jolly's Tagore Lectures, page 268). In spite of this consensus of opinion it is urged upon us that we ought to follow the Smriti Chandrika and recognize the distinction which is there made between three classes of stridhanam. One class is that called "yautaka" property given by any one to the bride and bridegroom while seated together at a marriage or the like when unmarried daughters alone succeed. The second class includes what a woman has received after marriage (anvadheya) and what her lord may have given her through affection (pritidatta). For that class the devolution is prescribed in Section 6 (Chapter IX, Section III). Thirdly, there is maternal property not included in the above kinds which devolves on the daughters only in the first instance. According to the commentator it is to this class only that the text of Gautama applies Chapter IX, Section III, Section 16. It is by no means clear that the property in the present case can be accurately called

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anvadheya—the doubt is as to whether the term includes property given by the father as well as property given by the father's family (Manu, Chapter IX, verse 195, and verse 5, Chapter IX, Section 1, Banerjee, page 278). We think we may pass by that question as also the question whether Devanda Bhatta's interpretation of the text of Manu is or is not the more correct one. It may be that his view represents a re-action against the admission of woman to the enjoyment of proprietary right (see Jolly's Tagore [62] Lectures, page 262). Certainly the Smriti Chandrika is far less favourable to woman than the Mitakshara. And it was argued that because the Courts have refused to follow the latter in dealing with the case of property inherited by a woman, we should therefore give preference to the authority of the Smriti Chandrika in the present instance. The grounds, however, on which the cases deciding the point proceed (*Bachiraju* v. *Venkatappadu* (1) and *Sengamalathammal* v. *Valayuda Mudali* (2) other cases in Mayne's Hindu Law, Section 567) do not affect the general authority of the Mitakshara on the question of stridhana. They afford no reason why in the present instance in which the Mitakshara does not stand alone and unsupported the views propounded in it should give way to those expressed in the Smriti Chandrika. A practical objection to the latter is that the adoption of them would complicate the law of inheritance and render the solution of many questions more difficult than would be the case if the Mitakshara were followed, for in dealing with anvadheya and prithidatta, the author of Smriti Chandrika contents himself with stating how it shall devolve in the first instance and makes no provision for the case in which there is a failure of sons as well as daughters (see Tagore Lectures, Banerjee, page 398).

We have been unable to find any decided case in which the question has been expressly raised. In *Bhujanga* v. *Ramayamma* (3), however the point might have been but was not taken. There a village had been given by a husband to his wife as a mark of affection (prithidatta) and on the death of the parents the question arose whether the daughter or the son in whose favour the mother had made a gift by will was entitled. Other questions were argued, but it was assumed that the daughter was the heir of her mother and the suit was decided in her favour. This was a case in which, according to the Smriti Chandrika, Section 6 (Lecture III, Chapter IX), the son and daughter should unquestionably have taken together, because the property came within the second of the classes mentioned above.

We think the question has been rightly decided, and therefore dismiss the appeal with costs.

(1) 2 M.H.C.R. 402. (2) 3 M.H.C.R. 312. (3) 7 M. 387.

**21 M. 63 = 1 Weir 648.**

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APPELLATE CRIMINAL.

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## [63] APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

QUEEN-EMPRESS v. MAHALINGAM SERVAI AND OTHERS.*
[23rd November, 1897.]

*Abkari Act (Madras)—Act I of* 1886, *Sections* 56, 64—*Holder of a license and his servants.*

The words "being holder of a license" in Abkari Act, Section 56, must be taken to include any person in the employ, or for the time being acting on behalf of the holder of a license.

**[Diss., 15 M.C.C. R. 136 (Cr.).]**

APPEAL on behalf of Government under Criminal Procedure Code, Section 417, presented against the judgment of acquittal pronounced by T. Kothandaramayya, Second-class Magistrate of Ramnad, in Calendar Case No. 549 of 1896.

The accused was charged under Section 56 of the Abkari Act of 1886, with exposing for sale toddy mixed with patnini, and he was acquitted on the ground he was not the holder of the license, but only the servant of the holder of the license.

The Public Prosecutor (Mr. *Powell*), for the Crown.

Accused were not represented.

### JUDGMENT.

In these cases the Government appeals against the acquittal of certain accused persons who were guilty of certain acts in breach of the Abkari licenses granted to their employers.

The Second-class Magistrate has acquitted the accused on the ground that, under Section 56 of the Abkari Act I of 1886, only the holder of the license, but not his servants or employees can be convicted.

This view is erroneous. It was held by this Court in Criminal Revision Case No. 639 of 1886 (1) that Sections 56 and 64 of the **[64]** Abkari Act must be read together and that the words "being the "holder of a license" in Section 56 must be taken to include any person

* Criminal Appeals Nos. 581 to 583 of 1897.

**21 M. 63 N = 1 Weir 647—(Sudalaimuthu Pillai, *in re*).**

(1) Case referred for the orders of the High Court by the Acting District Magistrate of Tinnevelly, being Calendar Case No. 131 of 1886, on the file of the Second-class Magistrate of Satur, in which two persons were convicted under Section 56 *(b)* of Act I of 1886. The Acting District Magistrate said:—"The second accused is the licensee "and his conviction is legal under the provisions of Section 61, paragraph 2. The first "accused not being the licensee does not come within Section 56, which relates only to "the holder of a license. I cannot interpret the words 'as well as the actual offender' "used incidentally in Section 64 as justifying his conviction, because the words imply "that the person has already committed an offence, *i.e.*, an act punishable." Muthusami Ayyar and Brandt, JJ., delivered the following judgment:—

JUDGMENT.—We do not consider that the construction suggested by the District Magistrate can be adopted. Section 56 and Section 64 of the Abkari Act must be read together, and if, as suggested by the District Magistrate, no offence could be committed under Section 56 but by the holder of the license, the words "for any offence committed by any person in his employ and acting on his behalf under Section 56" would be insensible. The words "being the holder of a license" in Section 55 must be taken to include any person in his employ and acting on his behalf for the time being. We decline to interfere. [This case is also followed in 1 Weir 648 = 21 M. 63.]

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in his employ and acting on his behalf for the time being, as otherwise the words in Section 64 "for any offence committed by any person in his "employ and acting on his behalf under Section 56" would have no meaning or application. This view of the law is, in our opinion, correct.

We set aside the acquittal in each case and we convict each of the accused Mahalingam Servai and Venkatachalam Servai of offences punishable under Sections 56 and 64 of Madras Act I of 1886, and we sentence Mahalingam Servai to pay a fine of Rs. 15 (fifteen rupees) or in default to suffer rigorous imprisonment for three weeks, and Venkatachellam Servai to pay a fine of Rs. 10 (ten rupees) or in default to suffer rigorous imprisonment for fourteen days.

As regards Ramasami Servai, accused in Criminal Appeal No. 583, we direct that he be re-tried in accordance with law, as the Magistrate does not appear to have gone into the facts in his case.

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**21 M. 64=8 M.L.J. 21.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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SIVATHI ODAYAN AND ANOTHER (*Defendants*), *Appellants v.* RAMASUBBAYYAR (*Plaintiff*), *Respondent.** [23rd July, 26th October and 30th November, 1897.]

*Transfer of Property Act—Act IV of* 1882, *Section* 85—*Mortgagee's suit—Parties—Redemption.*

A mortgaged lands X, Y and Z to B for Rs. 5,000. Lands X and Y were sold and the proceeds applied towards the discharge of the mortgage. Land Z was sold to C for Rs. 990, which was not so applied. C transferred his rights to the [65] present defendants. B brought a suit on the mortgage joining A and C but not C's transferees as defendants. C did not appear and a decree was passed by consent for Rs. 1,050, and land Z was brought to sale and purchased for Rs. 270 by the plaintiff who now sued the defendants separately for possession:

*Held*, that the defendants not having been joined in the previous suit were entitled to redeem on payment of Rs. 1,050 and interest.

[Rel., 33 C. 590=10 C.W.N. 592; R., 5 C.L.J. 315=11 C.W.N. 403; 4 C.W.N. 297 (303).]

SECOND appeals against the decree of W. Dumergue, District Judge of Madura, in appeal suits Nos. 574 and 575 of 1895, modifying the decrees of S. Ramasami Ayyangar, District Munsif of Sivaganga, in original suits Nos. 169 and 170 of 1895, respectively.

These were suits by the same plaintiff to recover possession of land under the following circumstances:—

On 3rd July 1885, Nagasundram Chetti and his son mortgaged three items of property to Chidambara Chetty to secure Rs. 5,000 and interest. In 1886 the mortgagors sold the third item of the mortgage premises, being 2½ pangus in a certain village, to Arulananda Odayar for Rs. 990, and he transferred his right in 2½ pangus to the present defendants in 1888 and 1890. Chidambara Chetty sued on the mortgage in original suit No. 4 of 1891, on the file of the Subordinate Court of Madura, (West), joining as defendants the mortgagors and also Arulananda Odayar (who did not appear), but not the present defendants. Part of the mortgage debt had

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* Second Appeals Nos. 905 and 906 of 1896.

been discharged by the proceeds of the sale of other two items of the mortgage premises before the suit, and while the suit was pending, the mortgagee purchased part of the mortgage premises. A decree was passed by arrangement for Rs. 1,050 against the mortgagors personally and the $2\frac{3}{4}$ pangus above referred to. In execution of the decree the $2\frac{3}{4}$ pangus were brought to sale and purchased for Rs. 270 by the present plaintiff, who now brought these two suits to recover the $2\frac{1}{2}$ pangus transferred to the defendants.

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The District Munsif by his decrees ordered that unless in each case the defendants within three months paid to the plaintiff the sums of Rs. 108 and Rs. 162, respectively, being two-fifths and three-fifths of the purchase money paid by him, the plaintiff should obtain possession.

The District Judge on appeal passed an unconditional decree for the plaintiff holding that the defendants had not proved title.

The defendants preferred these second appeals.

*Sundara Ayyar*, for appellants.

*Mahadeva Ayyar*, for respondent.

## JUDGMENT.

[66] If the District Judge intended to find that there was no transfer to Arulananda at all, it is clear that he was in error, and that on a matter about which there was no contest.

Arulananda was impleaded in the former suit (original suit No. 4 of 1891) as the transferree, and the plaintiff does not in these suits deny that transfer. Arulananda has transferred his right thereunder to defendants Nos. 1 and 2 and whether there was consideration for that transfer is a question that does not arise in these suits between the plaintiff and defendants Nos. 1 and 2. As the equity of redemption had thus vested in defendants Nos. 1 and 2, they should have been made parties to original suit No. 4 of 1891, and as they were not made parties, their rights are not affected by the decree. They are entitled to have the opportunity of redeeming the mortgage on the land.

We must, therefore, ask the District Judge for a finding on this issue, *viz.*:—What is the amount due by defendants Nos. 1 and 2 to plaintiff in respect of such redemption. Fresh evidence may, if necessary, be taken on this issue, and a return is to be made within two months of the receipt of this order.

Seven days will be allowed for filing objections after the finding has been posted up in this Court.

[In compliance with the above order, the District Judge submitted the following finding:—

Defendants are willing to pay Rs. 270 to redeem. Plaintiff, I presume, would have been willing to take a decree for Rs. 1,050, but he now argues through his vakil that he is entitled as a matter of law, to a proportionate share of the original mortgage and that, in general, is the view which I hold. The principle laid down in *Dadoba Arjunji* v. *Damodar Raghunath* (1), is, I think, applicable to the present case. The defendants are allowed to redeem, because they were no parties to original suit No. 4 of 1891. Had they been parties, their right to redeem would have been on condition of paying what was then due on the mortgage. The amount that plaintiff paid as a purchaser in execution, has nothing to do with the matter. . . . . The decree for Rs. 1,050 in original suit No. 4 of 1891

(1) 16 B. 486.

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was the balance—by consent of parties—then due on the mortgage. The defendants, had they been parties to original suit No. 4 of 1891, could have redeemed [67] on paying Rs. 1,050 on the date of the decree in that suit. They are now entitled to redeem on the same terms that they could have redeemed, had they been parties to original suit No. 4 of 1891—in fact, they are entitled to be put into the position they would have been in, had they been parties to original suit No. 4 of 1891. A proportionate share of the mortgage—on this date—is practically the same as the amount decreed in original suit No. 4 of 1891 with interest. The calculation would be as follows:—Total amount due on mortgage up till this date is Rs. 12,181-10-8. Deducting payments of interest, namely, Rs. 535-0-9 plus Rs. 1,436-10-8, the balance is Rs. 10,209-15-3 or roughly Rs. 10,210. I take the value of 2½ pangus, which plaintiff sues for, to be Rs. 900 and the total value of the mortgaged property to be Rs. 6,141. The proportion is about Rs. 1,500 in round numbers. I am of opinion, for the reasons mentioned above, that plaintiff is entitled to a decree for Rs. 1,050 plus interest on that amount at 10 annas per cent. from the date of the decree till the date of payment and this is my finding on the point referred by the High Court.]

These second appeals came on for final hearing on the 26th October 1897. The parties were represented as before.

## JUDGMENT.

We cannot accede to the contention that the District Judge is wrong in holding upon the issue remitted to him that the sum payable by the appellants to the respondent is not Rs. 270, the price paid by the latter for the property when he purchased it at the Court-sale held in execution of the decree obtained by the mortgagee, but Rs. 1,050, which the Judge found, to be the proportion of the mortgage-debt chargeable in respect of the property.

The decision is in accordance with the principle stated in Fisher on Mortgages in the following words.—" The assignee stands in the place of the assignor; and as the latter might have assigned to him *gratis*, it is but just that the measure of the allowance should be what was due and not " what was paid. The assignee taking the hazard should also have the " benefit of the bargain, of which neither the mortgagor nor any subsequent incumbrancer can have any equity to deprive him." (5th Edition, Section 1734.) *Davis* v. *Barrett* (1) is one of the modern cases in which the above [68] principle was acted upon. There A devised an estate to his heir who in his own right had a charge on it. The heir bought up an incumbrance on the estate amounting to £11,555 for £2,000. Sir John Romilly, M. R., held that the heir was entitled to the full amount as against other incumbrancers on the estate. In dealing with the contention that the owner of the second charge was entitled to have an account of what was actually paid for the purpose of getting in the former mortgage and of making it stand simply as security for that amount, the Master of the Rolls said: " I am of opinion that the second mortgagee has no such " equity against any stranger who might purchase the first charge, and " that the owner of the reversion not having created the first or second " charge, is, in this respect, entitled to stand in the place of a mere " stranger. It would be, as I believe, a new equity, and productive of the " most injurious consequences, if a second mortgagee were entitled, as " against the *bona fide* assignee of a first mortgage, to insist on an account

(1) 14 Beav. 542.

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"being taken of what was actually paid for the first mortgage." In *Macrae* v. *Goodman* (1) the Judicial Committee held similarly.

There are, no doubt, exceptions to the rule stated above as when the purchaser occupies a fiduciary position or when there is fraud or collusion. In the present case however the respondent was a *bona fide* purchaser at a Court sale which vested in him the right of the mortgagee in so far as the property in dispute was concerned. The finding of the District Judge must therefore be accepted.

The decrees of the Lower Appellate Court are reversed and those of the District Munsif restored with the modification that the amount payable by the appellants to the respondent is (instead of Rs. 270) Rs. 1,050 with interest thereon at 10 annas per cent. per mensem from the date of the decree to the date of payment. Each party will bear his own costs in this and in the Lower Appellate Court.

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**21 M. 69 = 7 M.L.J. 319.**

## [69] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

SUBRAMANIA AYYAR (*Defendant*), *Appellant v.* SAMINATHA AYYAR (*Plaintiff*), *Respondent.** [15th and 22nd October and 16th November, 1897.]

*Transfer of Property Act—Act IV of* 1882, *Section* 119—*Exchange—Mutual covenants subsequently entered into to support title*—" Expressum facit cessare tacitum."

The plaintiff and defendant effected an exchange of land; subsequently they executed to each other documents of which that executed by the defendant recited the exchange and continued "if any claim or dispute arises I hereby bind "myself to settle it. If I do not so get the dispute settled I hereby bind myself "to pay an amount not exceeding Rs. 4,014-8-6 at the rate of Rs. 1-4-0 per kuli "of lands for lands which go out of your possession." The plaintiff, alleging thathe had been ousted from the land conveyed to him, now sued to recover the land which he had given in exchange:

*Held*, that the operation of Transfer of Property Act, Section 119, was executed by the express covenant in the document quoted above.

[R., 15 C.W.N. 655 (659) = 8 Ind. Cas. 91.]

SECOND appeal against the decree of P. Narayanasami Ayyar, Subordinate Judge of Negapatam, in appeal suit No. 219 of 1896, reversing the decree of C. Venkata Rau Saheb, District Munsif of Mayavaram, in original suit No. 191 of 1895.

The plaintiff sued to recover from the defendant together with mesne profits certain land which he had given to the defendant in exchange for other lands in March 1891. The plaintiff alleged that he had been evicted from the lands transferred to him. In June 1891 the defendant had executed to the plaintiff a document called a security bond to the effect stated in the judgment of the High Court. This document comprised a postscript signed by the defendant which was as follows:—"I also bind "myself to the extent of Rs. 350 for expenses towards claims or disputes. "Thus the whole security is for Rs. 4,364-8-6." The plaintiff had similarly executed a security bond in favour of the defendant. The first part of the fourth issue was framed with reference to these documents as

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* Appeal against Order No. 35 of 1897.

(1) 5 Moo. P.C. 315.

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follows :—"Whether plaintiff has got cause of action for the suit in the "face of the indemnity bonds that were passed between the parties." The District Munsif passed a [70] decree dismissing the suit, holding on this issue, that the plaintiff was not entitled to the relief sought by him.

The Subordinate Judge on appeal was of opinion that the instrument of the 7th June would not debar the plaintiff from the right to recover either the lands conveyed by him on the exchange or compensation on proof that he had been ousted. He accordingly made an order remanding the case to be disposed of on its merits. The defendant preferred this second appeal.

*Krishnasami Ayyar*, for appellant.

*Ramachandra Rau Saheb* and *Rangaramanuja Chariar*, for respondent.

## JUDGMENT.

On the 1st March 1891 the plaintiff and the defendant executed an instrument of exchange and mutually transferred possession of the respective lands comprised in the instrument. It contains no provision by way of covenant for title, for quiet enjoyment or for re-entry, in case either party be evicted. On the 7th June 1891, however, the parties executed to each other documents styled "security bonds." The bond executed by the defendant to the plaintiff on that date, after reciting the exchange which had taken place, runs : "If any claim or dispute arises I hereby bind my-" self to settle it. If I do not so get (the dispute) settled I hereby bind " myself to pay an amount not exceeding Rs. 4,014-8-6 at the rate of " Rs. 1-4-0 per kuli of land for lands which go out of your possession. This "security bond shall be sustainable for twelve years from this date." The plaintiff, alleging that he was induced to enter into the transaction of exchange by certain untrue representations of the defendant and that he had been evicted from the lands transferred to him, instituted the present suit praying for the recovery of the lands which he gave in exchange to the defendant. The material allegations in the plaint were traversed by the defendant, and a number of issues were framed. The District Munsif, however, without trying the questions of fact as to which the parties were at issue, dismissed the suit, recording a finding upon the first part of the fourth issue. That part, though not clear and definite, appears to have been understood in the Lower Courts to raise the question whether the right to re-enter which, in the absence of a contract to the contrary, the plaintiff would possess under Section 119 of the Transfer of Property Act, was affected by the security bond obtained by the plaintiff from the defendant. The District Munsif [71] held that that instrument restricted the plaintiff's remedy in case of eviction to compensation at the rate agreed, and, therefore, the claim for the recovery of the land was unsustainable, and dismissed the suit. On appeal the Subordinate Judge was of opinion that the instrument in question modified the plaintiff's right in so far as the amount of compensation was concerned, provided he chose to ask for compensation ; but that it did not take away his right to recover the lands themselves, if he elected to claim such restoration. The Subordinate Judge set aside the District Muhsif's decree and remanded the suit in order that the other points in dispute may be tried.

The question for determination now is whether the construction put by the Subordinate Judge upon the security bond is right. In supporting that construction the learned vakil for the plaintiff strenuously argued

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that, on eviction, the plaintiff's right to re-enter upon the lands given by him in exchange must be taken to remain quite unaffected inasmuch as it is not expressly taken away by the security bond. We cannot accede to this contention. The rule applicable in such cases was long ago stated by Chancellor Kent in the following few words :—"An express covenant "will do away the effect of all implied ones : *Nokes* v. *James* (1) ; *Hayes* v. "*Bickerstaff* (2) ; *Browning* v. *Wright* (3)." *Frost* v. *Raymond* (4). Of those cited by the Chancellor the language of two of the authorities might be quoted here. Referring to an implied warranty, Butler said :—"The "insertion of any express covenant on the part of the grantor, would qualify "and restrain its force and operation within the import and effect of that "covenant, as the law, when it appears by express words how far the "parties designed the warranty should extend, will not carry it farther by "construction." (Butler's Notes on Coke upon Littleton, page 384*a*., Note 332.) And in *Browning* v. *Wright* (3) Buller, J., observed "The "words 'grant and enfeoff' amount to a general warranty in law, and have "the same force and effect. The covenants, therefore, which have been "introduced in more modern times, if they have any use besides that of "swallowing a quantity **[72]** of parchment, are intended for the protection "of the party conveying ; and are introduced for the purpose of qualifying "the general warranty, which the old common law implied. This has been "clearly settled ever since *Nokes's* case (1)." The same view has been often affirmed since and among these later cases it is sufficient to refer to *Line* v. *Stephenson* (5) and *Dennett* v. *Atherton* (6). In other words, the rule is that inasmuch as covenants in law are intended to be operative only when the parties themselves have omitted to enter into any contract respecting matters to which the covenants in law relate, the latter cease to have any force the moment such a contract is entered into, even though the contract expressly provides only for some of the matters covered by the covenants in law and is silent as to the rest. In such a case it is the contract alone that regulates and governs the nature of the party's obligation and the extent of his liability. The reason for this conclusion cannot be better expressed than in the language of Lord Denman, C.J., in *Aspdin* v. *Austin* (7) quoted with approval by the Judicial Committee in *Pallikelagatha Marcar* v. *Sigg* (8). He points out "where "parties have entered into written engagements with expressed stipu- "lations, it is manifestly not desirable to extend them by any implications ; "the presumption is that, having expressed some, they have expressed all "the conditions by which they intend to be bound under that instrument " . . . and it is one thing for the Court to effectuate the intention of "the parties to the extent to which they may have, even imperfectly, "expressed themselves, and another to add to the instrument all such "covenants as, upon a full consideration, the Court may deem fitting "for completing the intentions of the parties, but which they, either "purposely or unintentionally, have omitted. The former is but the "application of a rule of construction to that which is written ; "the latter adds to the obligations by which the parties have bound "themselves, and is, of course, quite unauthorised, as well as liable

(1) 4 Co. Rep., 80 = 1 Cro. Eliz. 674-5.
(2) Vaugh, 126.
(3) 2 Bos. and Pull. 13 = 5 R. R. 521.
(4) 2 Caines. 188 = 2 American Decisions. 228, at p. 231.
(5) 4 Bing. N.C. 678.
(6) L.R. 7 Q.B. 316.
(7) 5 Q.B.N S. 671, at p. 684.
(8) 7 I.A. 85.

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"to great practical injustice in the application." It follows, therefore, that even if the security bond were entirely silent with reference to the question of the right to take back [73] the land given in exchange by the plaintiffs that right was lost when the security bond was taken. But the bond is not quite silent on the point. On the other hand, the instrument by clear inference seems altogether to deprive the plaintiff of the right to recover the land. For the undertaking given by the defendant that he shall pay at Rs. 1-4-0 per kuli for so much of the land as the plaintiff might be evicted from distinctly suggests that the statutory covenant which would have enabled the plaintiff to recover the whole of the land given by him, even if he had been evicted from but a small portion of what he got in exchange was not intended to be enforced. Further, the terms of the bond, read as a whole, seem to lead to the conclusion that they entirely supersede the rights given by Sections 119 and 120. The provision that the bond shall be in force only for twelve years unquestionably shows that after the apse of that period the defendant was to be under no responsibility for the consequences of any defect in his title to the land conveyed by him and this is inconsistent with the contention that the right to recover the land given by Section 119, was left intact. Again, the covenant to settle any claim or dispute that might arise, respecting the land transferred by the defendant is much wider than the covenants arising under Sections 119 and 120. In short, there is such substantial difference between the express covenants in this case and the covenants implied by law that it would be quite unreasonable to impute to the parties an intention that the latter should have operation to any extent. The Subordinate Judge's construction of the document cannot, therefore, be sustained, and the plaintiff's prayer for the restoration of the lands sued for must fail, if the covenant as to it under Section 119 were the only ground on which it was based. As, however, the plaintiff has alleged in support of it other grounds also, which have not been tried, the order remanding the suit for their trial must be upheld notwithstanding our having arrived at a conclusion different from that of the Subordinate Judge as to the effect of the security bond on the plaintiff's alleged right to the possession of the lands sued for.

The costs will, however, abide and follow the result.

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**21 M. 74 (F.B.) = 2 Weir 719.**

## [74] APPELLATE CRIMINAL—FULL BENCH.

*Before Mr. Justice Shephard, Mr. Justice Subramania Ayyar, Mr. Justice Davies and Mr. Justice Boddam.*

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YALLA GANGULU *v.* MAMIDI DALI.*
[12th June and 5th, 18th, and 30th November, 1897.]

*Criminal Procedure Code, Section 545—Death caused by negligence—Compensation to widow.*

A magistrate imposed a fine in addition to a sentence of imprisonment on a conviction for the offence of causing death by a rash and negligent act and gave compensation to the widow of the deceased out of the fine imposed :

*Held*, that compensation could not be given to the widow under Criminal Procedure Code, Section 545.

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* Criminal Revision Case No. 218 of 1897.

[N.F., 36 C. 302=9 C.L.J. 204=9 Cr.L.J. 393=13 C.W.N. 362=1 Ind. Cas. 814; F., 16 C.P.L.R. 180 (191); 17 P.R. 1898 (Cr.) (F.B.).]

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CASE of which the records were sent for by the High Court under Section 435.

The Head-Quarter Deputy Magistrate of Godavari convicted a person charged before him in Calendar Case No. 16 of 1897 of an offence under the Indian Penal Code, Section 304-A, and he directed compensation to be given to the widow of the deceased man out of a fine imposed by him on the prisoner.

The prisoner appealed to the Sessions Judge who affirmed the conviction, but set aside the order of compensation as being illegal.

The records were called for by the High Court as above.

The matter having come for disposal before Benson and Boddam, JJ., they referred to the Full Bench the question stated by Benson, J., as follows :—

BENSON, J.—I find much difficulty in accepting *In re Lutchmaka*(1), as correct. No doubt it follows earlier rulings *In re Roop Lall Singh* (2), *Reg* v. *Shivbasapa* (3), but they proceeded on the words of Section 44 of Act XXV of 1861 which differ most materially from Section 545 of the present Criminal Procedure Code. In Section 44 the words are "the loss "appearing to be caused to the person who has suffered by such offence, "and any special damage of a pecuniary nature that may have resulted "to such person by such offence." The words "the person," not "any [75] person" clearly indicate that that section had in view only the person primarily injured by the offence; but in Section 545 the language is wholly different. It is "in compensation for the injury caused by the "offence committed, where substantial compensation is, in the opinion of "the Court, recoverable by civil suit." I think the word "where" means "in cases in which, and by persons by whom," compensation is recoverable.

Now under Act XIII of 1855 (founded on Lord Campbell's Act) compensation in such cases is recoverable by the "wife, husband, par-"ent and child, if any" of the deceased.

Section 545 (*b*) seems to me to have been framed so as to admit of compensation being given in cases where it is recoverable under Act XIII of 1855, and on principle I should think it very desirable that the Courts should have such power. Why should a poor widow be driven to a Civil suit in a case like this?

The case of *In re Lutchmaka*(1) was not argued, and I do not know if the learned Judges considered the remarkable change in the language of the present section.

My view seems to receive support from the corresponding Section 308 of the Criminal Procedure Code (Act X of 1872) which was intermediate between the Code of 1861 and the present Code. It provides for payment of compensation "for the offence complained of, where such offence can, "in the opinion of the Court, be compensated by money," and allows the payment to be made to or for the benefit of the complainant or the person injured or both. This allowed compensation to be given to a person other than the person primarily injured provided he or she complained. This, however, went far beyond Act XIII of 1855, since it allowed compensation to be given to any person who complained, however remote the injury to him. The present wording seems to me to have been adopted in

(1) 12 M. 352. (2) 10 W. R. Cr. 39. (3) 7 B. H. C. R. Cr. 73.

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order to restrict compensation to those cases where it could be claimed under Act XIII of 1855, *i.e.*, to the husband, wife, parent or child, except, of course, where death was not caused, in which case the injured person alone could claim. I would refer the matter to a Full Bench.

[The case then came on for hearing before a Full Bench constituted as above.

The parties were not represented.]

## JUDGMENT.

**[76]** SHEPHARD, J.—The question is whether, out of the fine imposed on a man convicted under Section 304-A of the Penal Code, compensation can be given by the Magistrate to the widow of the person whose death by drowning was brought about by the prisoner's act.

The question turns on the construction of Section 545 of the Criminal Procedure Code. To render Clause (*b*) of that section applicable it must appear that an "injury caused by the offence committed" has been suffered, and further that the injury is one for which substantial compensation might be given in a Civil suit. The term "injury" is defined in the Penal Code as follows:—"The word denotes any harm whatever "illegally caused to any person in body, mind, reputation or property;" and this definition holds good for the interpretation of the Criminal Procedure Code, Section 4.

The question then is whether the widow of a man who has been drowned by the criminal act of another can be said to have suffered an injury in that sense of the word. In my opinion it is impossible to answer that question in the affirmative. She has certainly not suffered in body, or reputation, nor has she suffered any injury in mind for which an action would lie, and I do not think it can be said she has suffered in property. I take it that the term "property" means something in existence and that it cannot, with any propriety, be applied to the reasonable expectation of pecuniary benefit for the loss of which an action in maintainable by the representative of a deceased person. Such a claim on behalf of a widow is analogous to that which may be made by a master in respect of wrongful acts done to his servant. He is entitled in such case to recover damages for the loss of service. There is no question of loss of property. If the claim of the widow in such a case as the present is maintainable, it must follow that the master of a servant, who has been disabled or put in wrongful confinement, may equally apply for compensation to be paid out of the fine inflicted on the offender. In my opinion it would be putting an undue strain on the language of the section to hold that it refers to and includes actions which may be brought on account of loss of service. It appears to me very unlikely that the Legislature should have intended claims of this sort involving somewhat difficult questions to be adjudicated upon by a Magistrate. But if there had been such intention, involving as I shall show, **[77]** an alteration of the law, surely some plain language would have been used to express the intention. There can be no doubt that under the Code of 1861, the claim of a widow could not have been entertained. In this respect I do not think any change was made in the Code of 1872. The "person injured" in Section 308 of that Code must, I think, as in the Code of 1861, mean the person against whose body, reputation or property the offence has been committed. To that person only, according to Section 308, could any sum be paid in the way of compensation, while to the complainant payment could be made on account of his costs.

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The only difference in the language of the section now in force consists in the insertion of the words "the injury caused by." Instead of directing that compensation be given for the offence, the law now directs that compensation be given for the injury caused by the offence. From a change of language which was so obviously required to make the sentence correct, I cannot conceive how any change of intention on the part of the Legislature can be inferred.

I think the decision in *In re Lutchmaka* (1) is right and would answer the question referred accordingly.

SUBRAMANIA AYYAR, J.—I concur.

DAVIES, J.—I agree with Shephard, J. It seems to me clear from the definition of the word "injury" as used in Section 545 (*b*) of the Code of Criminal Procedure that it can apply only to the case of the man whose death was caused. And in Act XIII of 1855 it is the deceased man, and the deceased man alone, who is described as the "party injured." As through his death, he cannot sue for the injury done to himself, that Act allows a suit of another character to be brought on behalf of his widow and other near relatives for compensation—not, be it noted, for the injury caused to the dead man—but for "the loss resulting from such death" to themselves. In other words it is not for the injury caused to the deceased, but for the loss occasioned to the near relatives in consequence of such injury that the action lies. The loss is one quite independent of the injury to the deceased, although it arises out of it, and cannot therefore, in my opinion, be included in the term "injury" as used in a limited sense in the Section 545, for it is not "caused by the offence committed," except indirectly.

[78] BODDAM, J.—I agree.

[The case came on for final disposal before COLLINS, C.J., and BENSON, J., who delivered judgment as follows :—]

## JUDGMENT (FINAL).

Under Section 413, Criminal Procedure Code, the Sessions Judge was precluded from entertaining the appeal.

We set aside his proceedings.

In exercise of our powers of revision we set aside so much of the Deputy Magistrate's order as awards compensation to the deceased man's widow.

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**21 M. 78 = 1 Weir 123.**

## APPELLATE CRIMINAL.

*Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.*

QUEEN-EMPRESS *v.* TIRUCHITTAMBALA PATHAN.*

[16th and 29th October, 1896.]

*Penal Code, Section 183—Resistance to the taking of property—Attachment of goods not being property of judgment-debtor.*

A decree having been passed against the assets of a deceased debtor, execution was taken out and the officer of Court proceeded to seize certain goods. The accused successfully resisted the seizure asserting that the goods seized were his own. He was thereupon charged with having committed an offence under the

* Criminal Appeal No. 258 of 1896.

(1) 12 M. 352.

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1 Weir 123.

Penal Code, Section 183, but he was acquitted for want of proof by the prosecution that the goods were assets of the deceased :

*Held*, that the acquittal was wrong and should be set aside.

[R., 21 M. 296 (298) = 1 Weir 135.]

APPEAL on behalf of the Crown under Criminal Procedure Code, Section 417, against the judgment of M. Agnisami, Second-class Magistrate of Mannargudi, in calendar case No. 22 of 1896.

A decree having been passed against the assets of a deceased debtor, execution was taken out, and the Amin of the Court attempted to attach and seize a brass plate in the possession of the accused as forming part of the assets of the deceased. The accused wrested it from the hands of the attaching officer stating that it belonged to him and not to the deceased. He was thereupon charged with the offence of offering resistance to the taking of property by lawful authority under Indian Penal Code, Section 183, and was tried by the Second-class Magistrate who acquitted him **[79]** for the reason that it was not shown that the property formed part of the assets of the deceased.

The present appeal was filed on behalf of the Crown as above.

Mr. *J. G. Smith*, for the Crown.

*Sivasami Ayyar*, for accused.

## JUDGMENT.

SHEPHARD, J.—The question is whether a person charged under Section 183 of the Indian Penal Code was rightly acquitted, on the ground that the prosecution failed to prove that the goods seized by the Amin and rescued by the accused were, as being part of the assets of the deceased debtor, liable to be taken in execution of the decree against his representatives. The question is whether the seizure of the goods was an act done by the lawful authority of a public servant within the meaning of Section 183. It was argued on behalf of the accused that no offence had been committed in resisting the Amin, because he was acting unlawfully in seizing goods, which could not properly be taken in execution. The Amin, being commissioned to take the goods of the deceased debtor, forfeited the protection of the law, when he proceeded to take the goods of the defendant himself, although he might have acted in good faith.

It appears to me that, in construing Section 183, the language of Section 99, as well as that of other sections concerning resistance to the acts of public servants, must be borne in mind. Section 99 declares that the protection afforded by the Penal Code to public servants acting in good faith under colour of their office is not lost to them, by reason of any mistake on their part in the exercise of their proper functions. A public servant may do an act of a kind which he has no authority to do. In such case, he could not be acting in discharge of his public functions (Sections 186—353) and the lawful authority required by Section 183 would be clearly wanting. The cases cited in argument afford instances (*Lilla Singh* v. *Queen-Empress* (1), *Queen-Empress* v. *Tulsiram* (2)). Whether or not the public servant in the case supposed could, if charged with any offence, shelter himself under the exceptions enacted in Sections 78 and 79 of the Code would depend upon the circumstances.

If, on the other hand, the act of the public servant is an act of the kind which the public servant is authorized to do, it is clear that no miscarriage on his part, due to an honest mistake of fact, **[80]** could

(1) 22 C. 286. (2) 13 B. 168.

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render him liable to a prosecution. Section 79 would afford him protection. Furthermore, resistance to such an act or an assault on the public servant in the course of doing the act is made punishable under Section 183 and Section 353 of the Code, respectively. We are asked to draw a distinction between Sections 183 and 186 and to say that there may be obstruction entailing punishment under the latter section, although the lawful authority which Section 186 presupposes is absent. It occurred to me at first that there might be some such distinction intended and that if the act of taking exposed the public servant to a civil action, it could not be said to be an act done by lawful authority. Ministerial officers do not enjoy the full protection which is granted to judicial officers by Act XVIII of 1850. Apart from considerations of civil liability, however, I think the object of the legislature as shown in the Code was to facilitate the transaction of public business by affording protection in two ways to public servants acting in the exercise of their duty. They are protected from criminal proceedings by Sections 78 and 79. They are insured against resistance by Section 99 and other sections of the Code. The intention was to give protection of this latter kind in all the cases in which, but for the immunity specially provided, the act of the public servant would amount to an offence. The phrase "lawful authority" used in Section 183 does not oblige us to hold that the cases in which the person charged may have a civil action against the public officer must be excluded from the operation of the section. In the present case, the Amin had lawful authority to take in execution the goods of the deceased. There was no mistake about his authority, but the mistake was in the mode in which he executed his duty and the section does not require that the execution of the authority, as well as the granting of it, must be strictly lawful. To hold that a judgment-debtor might with impunity resist the seizure of goods found in his house, on the mere plea that they belonged to somebody else, honesty and good faith on the part of the attaching officer being presumed, would reduce Section 183 to a dead letter. The decided cases support the view which I have adopted.

The acquittal must be set aside and the case disposed of according to law.

SUBRAMANIA AYYAR, J.—A decree was passed against the sons (minors) of one deceased Saminatha Pathan, son of the accused, [81] for a debt due by Saminatha. The minors were under the guardianship of the accused. In execution of the above decree, a warrant was issued for the seizure of certain articles of moveable property of the deceased debtor. When, with this warrant, the Amin went to the accused's house, where the articles were stated to be and had a plate seized, the accused, it is alleged, forcibly wrested the plate and threatened to use violence, if the Amin proceeded further with the execution of the warrant.

Now, supposing that the plate did, in fact, belong to the accused himself as urged by him, the question is whether that circumstance alone rendered the seizure by the Amin an act done without "lawful authority," within the meaning of Section 183 of the Indian Penal Code, so as to make the alleged resistance on the part of the accused permissible in law.

The argument in favour of the accused was in substance this: an officer in executing a process of law acts lawfully, only so long as he keeps himself strictly within the directions contained in the process under which he acts. Consequently, when the Amin took the plate which, in fact, did not form part of the estate of the debtor, the former was a wrong-doer and resistance to him was not unlawful, even though the Amin was not

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aware that the property did not belong to the deceased and even though the officer acted *bona fide*. This view of considering an act, which is done by a public servant in the course of his duties and which is not in every way perfectly consistent with what he should have done in the particular case, to have been committed without "lawful authority" has clearly not been adopted in the Indian Penal Code, as will be seen from the provisions of Section 99, with which Section 183 should be read. Taking the two together, the reasonable construction to be put is that, if the officer acted in good faith under colour of his office, the mere circumstance that his "act may not be strictly justifiable by law" cannot affect the lawfulness of his authority. And the chief reasons for this view are that the likelihood of serious injury resulting from such acts (excepting those tending to cause apprehension of death or grievous hurt) of persons clothed with public authority and subject to public responsibility is so small that the parties, whose rights are thus invaded, would be sufficiently protected by their being left to obtain redress solely by appealing to the constituted authorities in due course and that, in such cases, to secure an easy **[82]** and peaceful execution of legal processes, it is necessary that recourse to self-help on the part of the persons affected should be disallowed. It may not be out of place to observe that in England also, for like reason, a similar conclusion was arrived at in *Regina* v. *Allen* (1). Referring to the contention that the illegality of the arrest in question there reduced the offence to manslaughter, Blackburn, J., said :—"It was further manifest that . ". . . they knew well that, if there was any defect in the warrant or "illegality in the custody, that the Courts of law were open to an application for their release from custody. We think it would be monstrous "to suppose that, under such circumstances, even, if the justice did "make an informal warrant, it could justify the slaughter of an officer in "charge of the prisoners or reduce such slaughter to the crime of "manslaughter. To cast any doubt upon this subject would, we think, "be productive of the most serious mischief by discouraging the Police in "the discharge of their duties and by encouraging the lawless in a disre-"gard of the authority of the law." (Mayne's Criminal Law of India at page 426.) Nor is the circumstance that the irregularity of the particular act of the officer is such as to give rise to a cause of action against him material, since the provisions of Section 99 already referred to are not limited only to such acts "not strictly justifiable by law" as do not furnish ground for a civil action.

The cases of *Queen-Empress* v. *Ramayya*(2) and *Bhawoo Jivaji* v. *Mulji Dayal*(3) fully support our conclusion. *Regina* v. *Gazi Kom Aba Dore* (4) relied upon by the Second-class Magistrate is distinguishable from the present case. There the officer altogether transgressed his powers in breaking open the outer door, which he was not entitled to do, except on conditions that were not shown to have existed. Here, however, the Amin did not transgress any established rule of law as to the limit of his powers, but acted erroneously with reference to a matter, which no doubt rendered the particular act invalid, but did not affect the nature of his authority.

I agree, therefore, that the acquittal of the accused should be set aside. The case must be restored to the file and disposed of according to law.

(1) Stephen's Digest of the Criminal Law, 4th Ed., p. 390. (2) 13 M. 148.
(3) 12 B. 377. (4) 7 B.H.C.R. Cr. 83.

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## [83] APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.*

QUEEN-EMPRESS *v.* RAMAN AND OTHERS.*
[14th July, 1897.]

*Confessional statements of accused—Subsequent retraction—Criminal Procedure Code, Section 103—Search by Police of stolen property—Charge to Jury.*

It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. A Jury should be asked with reference to such confessions, not whether they were corroborated by independent evidence but whether having regard to the circumstances under which they were made and retracted and all the circumstances connected with them, it was more probable that the original confessions or the statements retracting them were true.

Criminal Procedure Code, Section 103, does not justify the view that the persons called upon to witness a search are to be selected by any person other than the officer conducting the search.

If the Sessions Judge considers that the evidence of an Inspector of Police is necessary, he ought not to animadvert on his absence in charging the Jury; but he should intimate his opinion to the Public Prosecutor and give him the opportunity of calling that official.

It is wrong for a Judge in charging the Jury to say that a Head Constable committed a breach of the Police regulations in conducting a search with a loose shirt on, without examining him on the matter and taking evidence as to whether or not his body was examined before he began the search.

[F., 23 B. 316 (317); 16 P. R. 1903 (Cr.)=153 P. L. R. 1903; R., 13 Cr. L. J. 763 (764)=17 Ind. Cas. 75=23 M. L. J. 445=(1912) M. W. N. 1111; 1 L.B.R. 238 (246).]

APPEAL on behalf of Government under Section 417 of the Criminal Procedure Code against the acquittal of six persons, who were tried on the charge of dacoity by H. H. O'Farrell, Sessions Judge of South Malabar, and the Jury in calendar case No. 40 of 1896.

Evidence was given against all the prisoners to the effect that parts of the property stolen had been found in the possession of each of the prisoners. The first and second prisoners had made and retracted confessional statements, as to which the Judge's charge is quoted in full in the judgment of the High Court. As to the discovery of the property he said *inter alia*:—

"I now go to the discovery of the property. It is certain that a "good deal of property was lost that night, and I see no reason to [84] "doubt that a list was drawn up next morning embodying the description "of the property. That fact is spoken to by the Nambudri and also by "the adigari who went there next morning. There is some confusion as "to which was the original list, whether the one which the adigari "now produces or the one that is marked as A. The vakil who represents "the first and second accused seems to suggest that neither of them "is the original and there was another original which has been "suppressed. I do not quite see the point of his suggestion, because, even "supposing that there was another original besides these two lists A and "A1, there appears to be no doubt, that these lists were drawn up long

* Criminal Appeal No. 169 of 1897.

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"before the prisoners were arrested. This offence took place on the 8th "of March, and the first, second and third prisoners were not arrested "until 4th June and others later. The accused deny entirely that these "properties were discovered in their houses or that they gave them "up in any way. With regard to the first and second accused it is said "that they gave up two lots of properties which you see before you. For "this you have the evidence of the Head Constable and of an adigari. I "must remark with regard to many of these searches (if they are to be considered as searches), that they do not seem to have been properly conducted "at all. I shall deal more particularly with that point when I deal with the "alleged finding of the property in the possession of fourth, fifth and sixth "accused. I will here tell you that the law requires at least two respectable inhabitants of the locality to be witnesses of the search. In this "case it seems to me very doubtful if any of the persons who are named "as witnesses are really inhabitants of the locality. These witnesses "should have been selected, as it were, perfectly at random, so that there "may be no favouritism or humbug in the search, and there will be every "chance of the search being fairly conducted. If, however, the Head "Constable or the Inspector is permitted to select any persons that he "chooses to be witnesses for the search, then the whole search becomes "a farce. There is no certainty of its being properly conducted. It is very "much the same thing as if the Public Prosecutor were permitted to "select the Jury in every case that comes before the Session. It is not "sufficient if the Police get the adigari and two or three men of their "own selection to witness the search. The law requires that two respectable persons living in the neighbourhood shall be called upon to witness "the search. I cannot say, of course, [85] that, if these precautions are "not carried out, the evidence would be inadmissible, but I do say that "searches conducted in this manner—where the Police get their own men "to witness the search—should be looked upon with the greatest possible "suspicion.

"With regard to the first and second accused the statement "of the Head Constable Ramunni Nair is that he arrested the first "accused on the 4th June and that he brought out a locked box and "unlocked it with a key which he had and handed over this first batch of "articles which you see before you. I will deal with the identification "of them afterwards. The Vellivazhi adigari was present and it is said "some neighbours also. When the Head Constable was cross-examined "as to the neighbours' whereabouts his answers were extremely vague. "As a matter of fact, the whole business of the searches and the selection "of the witnesses seem to have been arranged by the Inspector. The "usual game of hide and seek is played. The Inspector does not come to "this Court to give evidence. However there is very little to show that "there were really any neighbours present at the search. There is one "Sankunni Nair present at the search; he is said to be a neighbour and "lives within a furlong from the accused's house. Even if that is so, the "law requires that there should be at least two such persons and not "merely one.

"The fourth accused was arrested on the 15th June in his own house. "He is said to have gone to a bin which was locked and which was opened "with a key that the prisoner's wife brought at the prisoner's request. "There was a bag found buried in the paddy and on opening it there were "these kindies and other articles which you see here. As to that, a singular circumstance took place. The only witness brought to prove the

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"search was the acting adigari, Venkateswara Pattar, who said before "the Magistrate that he did not see the fourth accused arrested and that "when he got to the house he found these articles spread out in the "verandah. The moment he said that, without hearing anything more the "Inspector, who made arrangements for the searches and who was prose- "cuting the case before the Magistrate, at once jumped up and said that he "dispensed with this witness entirely. The Magistrate, however, insisted "on this man's evidence being taken and he has given evidence here. I "think that there is very little reason to doubt the evidence he has given "and that he is a very honest and truthful witness. There seems no reason "why [86] he should come forward and make these statements in favour "of the accused. He seems to have no interest in the prisoners at all and "is of quite a different caste. Moreover the evidence is, to a certain "extent, against his interest, because he had to admit that he did do an "act which was not quite right, *viz.*, to sign the search list as having "been present when the articles were actually found. Thereupon the Police "Inspector seems to have called a supplemental witness called Kunbi Komu "to prove the search and corroborate the Head Constable. This Kunhi "Komu was a man who was present at all the three searches. He is not a "respectable inhabitant of the locality called in at the time of the search. "The Inspector seems to have met him casually in the bazaar and asked "him to go with him and witness all the three searches. You noticed "that the Inspector took all these witnesses from one house to another— "from fourth to fifth and from fifth to sixth just as if they were a thea- "trical company—to witness the searches. Proceedings of that kind are "open to the utmost suspicion. When this witness Kunhi Komu was in "the witness box he struck me as an unsatisfactory witness. Of course, "it is for you to say what you think of these witnesses, but I am telling "you how they struck me. Kunhi Komu was a man who had to admit "that he had a larger connection with police cases in the capacity of a "witness than falls to the lot of most people. He was prepared to "corroborate the Head Constable through thick and thin even to the extent "of being able to see through a bamboo ceiling: I do not suppose that "for a moment you can place any reliance upon witnesses of this descrip- "tion. However his statement and that of the Head Constable are against "the statement of Venkateswara Pattar. Both these witnesses swear "that Venkateswara Pattar was present at the time when the fourth "accused was arrested and he actually saw the delivery of the property. "If Venkateswara Pattar is to be believed, then the Head Constable and "Kunhi Komu are lying. It will be for you to choose between these "two stories.

"From the house of the fifth accused they went on to that of the "sixth. The Head Constable says that he got on to the top of the bamboo "ceiling and brought out a bundle which he says he found among the "cocoanut leaves. The witness Venkateswara Pattar corroborates that "story and says that he (Head Constable) did certainly get on to the ceiling "and bring down this bundle, but that he did not, in fact he could not, "see how he found it. [87] The witness Kunhi Komu corroborates the "Head Constable through thick and thin and says that he actually saw "the bundle taken out from the cocoanut leaves. In fact his history seems "to be that he was able to see through the ceiling. When I directly put "him the question whether it was on top of the cocoanut leaves or "whether it was buried in them, he at once said he could not say, that "of course shows distinctly that he could not see anything of the kind

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"that he professes to have seen and that this witness is prepared to swear "to anything that the Head Constable swears to. The bundle, when "opened, was found to contain these four articles. It has been pointed out "that the articles found in the previous houses were carried about in "gunny bags, and the bundle might very easily be concealed in one of the "bags. The Head Constable when he went to the attom according to "Venkateswara Pattar's story, had a loose shirt on. That again is directly "contrary to the Police Regulations, because the body of the man who is "to search must be examined before he enters upon the search. It is "suggested that this bundle might have been smuggled by the Head "Constable in his loose shirt when he got up to the attom while the others "were busily engaged in searching the other parts of the room. It will be "for you to say whether you think it possible in some way or other that "this bundle might be smuggled up into the attom at the time of the "search. The prisoner denies having been arrested at his house. All the "witnesses including Venkateswara Pattar say that the accused was ar-"rested at his house."

The Public Prosecutor (Mr. *Powell*), for the Crown.

Accused were not represented.

## JUDGMENT.

This is an appeal on behalf of Government against the acquittal of six prisoners tried on a charge of dacoity. The appeal is supported on the ground that the Sessions Judge has in several matters misdirected the Jury. As regards the first two prisoners, the evidence consisted of statements made by them shortly after their arrest and the discovery of things said to be part of the stolen property in the houses or under the control of these prisoners. These two prisoners were both arrested on the 4th of June, and they appear to have been brought before the Second-class Magistrate on the 6th. On the 9th of June they were again brought before him, and each of them made a statement implicating himself in a qualified way in the dacoity. They mention the circumstances of their arrest in their houses and admit that they [88] gave over the things produced at the trial to the Police. The usual certificate is appended by the Second-class Magistrate to the statements made by these two prisoners.

On the 8th of July the first prisoner was again brought before the Magistrate and again admitted that he took part in the dacoity, but pleaded that he did so under compulsion. The other prisoner made a statement on the same day to much the same effect. On the 13th August 1896 when the case was committed for trial by another Magistrate, the first prisoner denied that he had ever made a confessional statement before the original Magistrate and denied the search in the house and the discovery of property in it. The other prisoner on the same occasion said that he had made his confessional statement under the belief that he would be taken as an approver, and denied the truth of the allegations made in it.

The Sessions Judge makes the following observations with regard to these confessions. He says "they have been retracted and I advise you "to pay no attention to them unless you think that they are corroborat-"ed by independent evidence. If you find that it has been satisfactorily "proved that the first and second accused had in their possession pro-"perty which was stolen on that night, that, no doubt, would be a "corroboration, and you may rely upon the confessions although they

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"have been retracted." Exception is taken by the Public Prosecutor to this direction on the part of the Judge. We are aware that language of this sort is frequently used by Judges with reference to confessional statements which have been retracted, and there are, no doubt, cases in which the proposition involved is a correct one. But we are of opinion that it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to such a confession must, it is clear, depend upon the circumstances under which the confession was originally given and the circumstances under which it was retracted including the reasons given by the prisoner for his retractation. It is obvious that a confession in itself reasonable and probable must, if repeated more than once and retracted only at a late stage in the proceedings, have greater weight attached to it than a confession made once only and retracted after a short interval. There are other circumstances which may go to diminish or to increase the weight that should be attached to a confession. In the present case certainly the circumstances under [89] which the confessions were originally made and the fact of their repetition a few days later are circumstances which clearly ought to be brought to the attention of the Jury. The question which should have been put to them with regard to the confessions was not whether they were corroborated by independent evidence, but whether having regard to the circumstances under which they were made and the circumstances under which they were retracted—having regard to all the circumstances connected with the confessions, whether it was more probable that the original confessions or the statements made before the Committing Magistrate were true. We think that the omission on the part of the Judge to place the circumstances before the Jury and to put this question to them amounts to a misdirection, and the misdirection is the more important, because except in the second paragraph of the summing up—part of which has been quoted—there is no other mention whatever of the confessional statements.

The fourth paragraph of the summing up deals with the subject of the searches, and the Public Prosecutor takes exception to various observations of the Judge made in this and in the fifth, eighth and tenth paragraphs. The Sessions Judge in effect recommends the Jury to regard the evidence respecting these searches with the greatest possible suspicion, being of opinion that the precautions, which the law requires, were not duly observed. The points which he takes are that the persons called upon to witness the searches were selected by the Head Constable and the Inspector, and were not shown to be respectable inhabitants of the locality in which the place of the search was situate. The observations made by the Sessions Judge are, in our opinion, founded on a mistaken view of the law, and were calculated seriously to prejudice the prosecution. Section 103, Criminal Procedure Code, requires the officer about to make a search to call upon two or more respectable inhabitants of the locality in which the place of the search is situate to attend and witness the search. There is nothing in that or in any other section of the Code to justify the notion that the required witnesses are to be selected by any person other than the officer conducting the search. Assuming what is by no means clear that the witnesses to the search of the first and second prisoners' houses were not inhabitants of the locality, we do not think that that circumstance must necessarily expose the conduct of the Police to

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suspicion, or render the evidence of the search inadmissible. [90] In the fifth paragraph of the summing up after referring to the selection of the witnesses by the Inspector, who was present at the time, the Judge observes: "The usual game of hide and seek is played. The Inspector does not come to this Court to give evidence." We do not quite understand the force of this observation. If the Sessions Judge had, after the examination of the Head Constable, considered that the evidence of the Inspector was necessary, he ought to have intimated his opinion to the Public Prosecutor and given him an opportunity of calling that official. That course would have been the more advisable having regard to what the Sessions Judge observed in the eighth paragraph of the summing up about the conduct of the Inspector and the inquiry before the Magistrate —an observation which does not appear to be founded upon any evidence before the Judge.

Dealing first with the case of the first and second prisoners, we are of opinion that there have been material misdirections to the Jury as well with regard to the confessional statements made by those prisoners, as with regard to the searches made in their houses and the discovery of property said to be part of the stolen property. As regards the other four prisoners, the case stands on rather a different footing, for none of them made anything in the way of a confessional statement. As against the third and fourth prisoners, there is evidence to the effect that they were identified on the night of the dacoity by some of the witnesses. There is no misdirection in the charge with regard to that part of the case. Against all the four prisoners—prisoners 3, 4, 5 and 6—there is evidence, that searches were made in their houses, and parts of the stolen property found therein. We have already dealt with the general observations of the Sessions Judge regarding these searches contained in the fourth paragraph of the summing up; dealing with the case of the fourth prisoner, in the eighth paragraph of the summing up the Sessions Judge makes other observations to which exception is taken. He refers, as already mentioned, to the conduct of the Inspector and the inquiry before the Committing Magistrate. He speaks to one of the witnesses, Kunhi Komu, in language which would be suitable to the counsel for the defence, but certainly not suitable in the mouth of a Judge directing a jury. But the most serious objection taken to the observations in this paragraph is the reflection on the conduct of the Police in taking the witnesses whom they had summoned from the search of one house to that of another. The Sessions Judge says that the Inspector took these [91] witnesses from one house to another "just as if they were a theatrical company. Proceedings of that kind are open to the utmost suspicion." This is an observation which ought never to have been made. The Head Constable testifies to the difficulty of finding respectable persons in the neighbourhood in which the dacoity took place. We can see no reason for supposing that the conduct of the Police in this connection was influenced by any improper motives. In the tenth paragraph of the summing up, the Sessions Judge charges the Head Constable with the direct breach of the Police Regulations in that when he went to the *attom* in the course of the search of the sixth prisoner's house, he had a loose shirt on. It is not apparent even according to Venkateswara Pattar's evidence, that there was any breach of the Police Regulations, because he does not say that the Head Constable's body was not examined before he began the search, and that is the effect of the Regulation to which we suppose the Sessions Judge refers. However that may be, the Head Constable

was not examined about it, and it was therefore unfair to make this charge against him. We are of opinion that there has been a misdirection by the Sessions Judge with reference to the evidence touching the searches of the houses of the third, fourth, fifth and sixth prisoners, and the misdirection is a material one. We set aside the acquittal of all the prisoners, and direct them to be re-tried by the Sessions Judge of North Malabar.

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21 M. 91 = 8 M.L.J. 28.

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

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ARUNACHALAM CHETTY (*Plaintiff*) *Appellant v.* MEYYAPPA CHETTY AND OTHERS (*Defendants Nos.* 1, 3 *and* 4), *Respondents.** [20th, 21st, 22nd October and 16th November, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Sections* 13, 42, 43, 462—*Sanction to compromise a suit against a minor—Suit to set aside a consent decree for want of sanction—Previous suit to set aside decree on the ground of fraud on guardian ad* litem.

A suit instituted in 1879 against a minor was compromised by the plaintiff and the guardian *ad litem*, and a decree for the plaintiff was passed by consent. In 1882 the minor sued by his next friend to have the consent decree set aside [92] on the ground that it had been obtained by fraud practised on the guardian *ad litem*. That suit was dismissed. In 1884 an application was unsuccessfully made in the original suit objecting that the compromise had been entered into without the sanction of the Court. The minor having attained majority now sued to have the consent decree set aside on the ground that it had not been sanctioned by the Court under Civil Procedure Code, Section 462.

*Held*, (1) that the Court by passing the consent decree had not, *ipso facto*, sanctioned the compromise under Civil Procedure Code, Section 462, and that the present suit was not barred by the order dismissing the application in 1884;

(2) that the suit was barred by the decree in the suit of 1882 for the reason that the want of sanction might and ought to have been made a ground of attack in that suit.

[**Diss.**, 26 M. 760 = 13 M.L.J. 448; 27 M. 102 = 13 M.L.J. 439; **Appr.**, 17 Ind. Cas. 445 (455) = 23 M.L.J. 543 (560) = 12 M.L.T. 500 = (1913) M.W.N. 1 (26); **R.**, 35 M. 216 (229) = 10 Ind. Cas. 75 = 21 M L J. 344 = 10 M.L.T. 533; 1 C.L.J. 248; 17 C.P.L.R. 147 (158); 6 O.C. 175 (182).]

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East), in original suit No. 50 of 1895.

The facts of the case appear sufficiently for the purposes of this report from the judgment of Subramania Ayyar, J. The Subordinate Judge dismissed the suit and the plaintiff perferred this appeal.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyanyar*), *Desikachariar* and *Ganapathi Ayyar*, for appellant.

*Sundara Ayyar* and *Venkatsubbaramayya*, for respondent No. 1.

## JUDGMENT.

SUBRAMANIA AYYAR, J.—Murugappa Chetti, the deceased father of the present first defendant (first respondent), sued the present plaintiff (appellant) in original suit No. 42 of 1879 for a sum of money alleged to be due by the father of the plaintiff, the late Ramasami Chetti. The plaintiff, being then a minor, was represented in the suit by his mother and guardian *ad litem*. At first she contested the suit, but during the trial she entered

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* Appeal No. 32 of 1897.

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into a compromise consenting to the sum claimed being decreed against the estate of the plaintiff, the father of the first defendant giving up his costs. A decree was given in accordance with the compromise. In 1882 litigation again arose between the plaintiff and the first defendant's father. One Palaniappa Chetti, as the next friend of the present plaintiff, instituted original suit No. 48 of 1882 against the first defendant's father for the purpose of setting aside the decree in the previous suit No. 42 of 1879 on the ground that it had been obtained by fraud practised on the plaintiff's guardian *ad litem*. In the course of the suit Palaniappa Chetti was removed from the position of next friend and the present third defendant was appointed in his stead. The third defendant carried on the litigation with the result that the suit was dismissed, it being found that no fraud was made out. Another attempt to get rid of **[93]** the decree in suit No. 42 of 1879 was made in 1884 by an application purporting to be made in that case itself. In the application the point taken was that the compromise was entered into without the sanction of the Court as required by Section 462 of the Civil Procedure Code; but the Subordinate Judge, who heard the application, rejected it holding that, in effect though not expressly, sanction had been given. An appeal was preferred to the High Court against the order rejecting the application. The appeal was, however, dismissed for the reason that against such an order no appeal lay. The plaintiff, having since come of age, has instituted the present suit praying that the decree in suit No. 42 of 1879 be set aside and the sums collected in execution of the decree be made good to him by the first defendant. In the Lower Court the plaintiff relied in support of his case, both on the fraud by which his mother was said to have been induced to enter into the compromise and on the want of sanction. He further alleged that suit No. 48 of 1882 was a mere sham proceeding carried on in collusion between the plaintiff's next friend on the one hand and the first defendant's father on the other, and that, therefore, the adjudication therein was not binding upon the plaintiff. On all the main questions raised, the Lower Court found against the plaintiff and dismissed the suit.

Here on appeal the learned Advocate-General, on behalf of the plaintiff, did not press the ground taken against the finding of the Lower Court that the fraud alleged with reference to the decree in suit No. 42 of 1879 was not established. He contended, however, that the Lower Court was wrong in holding that the compromise had been sanctioned and urged that the decree in suit No. 42 of 1879 should be vacated on the ground of want of sanction.

We agree with the Advocate-General that no sanction was given for the compromise as alleged for the first defendant. There is absolutely nothing to show that any application for sanction was made to the Court. The little evidence that has been adduced upon the point clearly indicates that the decree was passed upon the compromise without the Court considering or determining the question whether sanction should be accorded or refused. It is scarcely necessary to add that the mere passing of the decree on the compromise does not amount to sanction being given within the meaning of the law. And in the circumstances of this case it would be wrong for the Court to presume on the ground of lapse **[94]** of time that sanction was given. The plaintiff would, therefore, be entitled to the principal relief claimed if he is not, as was urged for the respondent, precluded from relying on the absence of sanction either by the order of 1884 already referred to, or by the decision in original suit

No. 48 of 1882. That the order of 1884 does not operate as a bar is quite clear. The question whether sanction was given or not, being one going to the very root of the decree passed on the compromise, was such as could not be raised in *execution* of the decree. The order was, therefore, one which did not come under Section 244 of the Civil Procedure Code. No doubt if an application for review of the decree, passed on the compromise, had been made to the Judge, who passed the decree, he could have entertained the application and set aside the decree for the reason that the requisite sanction had not been given. But the application, on which the order of 1884 was passed, was made to the successor of the Judge who passed the decree. The successor had, under Section 624 of the Civil Procedure Code, no power to entertain an application for review on the ground of absence of sanction. The order thereon was, therefore, manifestly *ultra vires* and could not affect the plaintiff.

The next and the real question in the case is whether the plaintiff is precluded from relying upon the want of sanction by the decision in original suit No. 48 of 1882. In arguing that the plaintiff was not so precluded, the Advocate-General questioned the Lower Court's finding that the last-mentioned suit was not a sham and collusive proceeding. We are, however, unable to accede to the contention. The sole evidence on the point is that of the third defendant. The story that, without any intelligible reason for the vile conduct which the third defendant imputes to himself, he joined the first defendant's father and others to defraud the plaintiff, the infant son of the third defendant's late master and kinsman, is so improbable that we cannot but reject it. The Lower Court was, therefore, in our opinion, right in discrediting the third defendant's testimony and coming to a conclusion on the point against the plaintiff.

What then is the effect of the decision in that suit (No. 48 of 1882) upon the plaintiff's right to impeach the decree in suit No. 42 of 1879? Is it a bar to the plaintiff's present suit? In urging that it was not, the Advocate-General contended that the right to avoid the compromise on the ground of want of sanction was **[95]** exercisable only by the plaintiff on his ceasing to be a minor, but not by any next friend on his behalf. There is, however, absolutely nothing in the language of Section 462 of the Civil Procedure Code to warrant the view that the right to impeach a compromise entered into contrary to its provisions is of the peculiar character contended for. Nor was any authority cited to support that contention. And in reply to the argument that if persons, interested in a minor, were not allowed to question a compromise entered into on his behalf without the requisite sanction, minors would, in general, be very seriously prejudiced, all that the Advocate-General could and did say was that it is perhaps open to Courts to treat such a matter as one involving an election on the part of the minor concerned, and to determine whether in the interest of the minor the compromise shall or shall not be repudiated. It is scarcely necessary to observe that no statutory provision giving to Courts authority to exercise such special and extraordinary power exists, and in the absence of such provision no tribunal in the country can take action of the kind suggested. The Advocate-General next contended that, even supposing the right to impeach the compromise for want of sanction may be exercised by a next friend, such want of sanction was not a matter which might and ought to have been made a ground of attack under Explanation II of Section 13, Civil Procedure Code. His arguments on this point may be shortly stated thus:—On the analogy of the

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decision of the Judicial Committee in *Pittapur Raja* v. *Suriya Rau* (1), relating to the construction of Section 7 of the Civil Procedure Code of 1859 corresponding to Section 43 of the present Code, a plaintiff is not required under Section 13 of the latter Code to combine all the causes of action avilable at the date of the suit and which would entitle him to the relief therein claimed. What Section 13 obliges a plaintiff to do is to rely upon all the grounds necessarily connected with the particular cause of action on which the plaintiff chooses to sue. In determining what such grounds are Courts should have regard to such cases as *Cooke* v. *Gill* (2) and *Read* v. *Brown* (3), explaining what constitutes a cause of action. According to them the want of sanction now relied on did not form a constituent part of the cause of action alleged in suit No. 48 of 1882 which was founded [96] on fraud alone. The evidence required to sustain such a suit is not the same as that required to support a suit wherein the ground of attack is entirely different, *viz.*, want of sanction. The compromise, though in fact a single act, yet in point of law, amounted to a violation of two distinct rights vested in the plaintiff, and on the authority of *Brunsden* v. *Humphrey* (4) the plaintiff must be held not precluded by an adjudication in the suit, instituted with reference to the violation of one of those rights, from maintaining a subsequent suit in regard to the violation of the other right. Lastly, if the want of sanction was a matter which might and ought to have been made a ground of attack in the suit of 1882, still, as it was not adjudicated upon, it could not be held on the authority of *Kailash Mondul* v. *Baroda Sundari Dasi* (5) to operate as *res judicata*.

The argument on the other side was briefly as follows:—Such cases as *Cooke* v. *Gill* (2) and *Read* v. *Brown* (3) deal with what a cause of action is with special reference to questions connected with venue. The definition of a cause of action adopted with reference to such questions is not a proper guide in dealing with matters bearing on *res judicata*. Nor are the cases decided under Section 7 of Act VIII of 1859 or Section 43 of the present Code pertinent in cases like the present. Even under Section 2, Act VIII of 1859, which expressly used the term, 'cause of action' their Lordships of the Judicial Committee put upon that term a wide interpretation in *Woomatara Debia* v. *Unnopoorna Dassee* (6), where they held that the plaintiff who failed to obtain judgment for the possession of land claimed by her in her first suit as taufir or accretion could not bring a fresh suit claiming the same land as property belonging to her taluk according to the true boundary line. Their Lordships in their judgment referred to the rule that when a man claims an estate and the defendant being in possession resists that claim, he is bound to resist upon all the grounds that it is possible for him according to his knowledge then to bring forward (*Srimut Rajah Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver* v. *Katama Natchiar* (7) as one fully applicable to plaintiffs also—a proposition which is adopted in Explanation II, Section 13. Finally, supposing the narrow view contended for by [97] the Advocate-General were correct, still the cause of action alleged in original suit No. 48 of 1882 was precisely the same as that now relied on, and that the fraud on which suit No. 48 of 1882 rested and the want of sanction on which stress is now laid were nothing more than different ways of supporting but one alleged infringement of the plaintiff's right.

(1) 8 M. 520. (2) L.R. 8 C.P. 107. (3) L. R. 22 Q. B. D. 128.
(4) L.R. 14 Q.B.D. 141. (5) 24 C. 711.
(6) 11 B.L.R. 158. (7) 11 M.I.A. 50.

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In support of the arguments urged on both the sides, decided cases other than those referred to in the above summary were also cited. It may be conceded that the language employed by Courts is not always uniform. The diversity which exists is probably due, speaking generally, to the difference in the standpoints from one or other of which the question is dealt with. These are well explained in *Narohari* v. *Anpurnabai* (1). There, West, J., observes :—" Under systems such as the Roman Law or " the English Common Law, in which the development of legal rights " and duties has been greatly influenced by the re-action of a highly " artificial mode of procedure, appropriate forms of action can be found " for nearly all the ordinary cases which the legal consciousness of the " community recognizes as justifying an exercise of the coercitive power " of the State ; but, as the variety of human relations greatly exceeds that " of the conceptions, upon which a system of actions can be framed, it " happens that the same transaction or group of circumstances may " furnish a ground for several different actions. In such cases, different " causes of action arise to the party injured ; but as it is felt that the " same set of facts, which the mind at once grasps as jurally integral, " ought not to be made the basis of repeated proceedings ; the complaining " party is allowed to frame his complaint in various ways, and the rule " obtains that all the circumstances, which exists when the former of " two actions is brought and can be brought forward in support of it, " shall be brought forward then, not reserved for a second action arising " out of the same events. The cause of action is regarded as identical, " though the form of action differs on the second occasion, and the test " applied is whether the evidence to support both actions is substantially " the same (*Hitchin* v. *Campbell* (2) ; *Martin* v. *Kennedy* (3)). Under a freer " system of procedure, such as that of the Equity Courts in England or of " the Civil Courts in India, second suits are to be admitted more sparingly " than when the [98] plaintiff has to proceed by set forms of action. As " he can bring forward his whole case unfettered by artificial restraints, " and seek all remedies that the Court can justly award upon the facts " proved, there is no reason why he should be permitted to harass his " opponent and occupy the time of the Courts by repeated investigations " of a set of facts which ought all to have been submitted for adjudication " at once. His cause of action, into whatever Protean forms it may be " moulded by the ingenuity of pleaders, is to be regarded as the same, if " it rests on facts which are integrally connected with those upon which a " right and infringement of the right have already been once asserted " as a ground for the Court's interference." The wider view expressed in the latter part of the above quotation is evidently the view which the Judicial Committee had laid down in *Woomatara Debia* v. *Unnopoorna Dassee* (4) cited for the first defendant, and this is strengthened by the observation made by the same tribunal in *Kameswar Pershad* v. *Rajkumari Ruttan Koer* (5) that the state of the law at the time Section 13 of the present Code was enacted, was that persons should not be harassed by continuous litigation about the same subject-matter. There can be no doubt that Explanation II to Section 13 was put in to emphasize this wider view. And this is rendered as clear as it can possibly be by another section of the Code which, like Explanation II, found a place for the first time in the Code of 1877, in which the

(1) 11 B. 160 N. (165.) (2) 2 W. Bl. 827. (3) 2 Bos. & Pull. 69.
(4) 11 B. L. R. 158. (5) 20 C. 79.

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provisions as to *res judicata* were amplified practically as they are now. That Section is section 42 which provides that every suit shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute and so to prevent further litigation concerning them. In short, the omission by the Legislature of the term 'cause of action,' upon which the point turned in Section 2 of Act VIII of 1859 from the corresponding section of the present Act, the insertion therein of a more definite term, *viz.*, 'matter directly and substantially in issue,' the introduction of the comprehensive words 'subjects in dispute,' in Section 42 and the fact, that Explanation II to Section 13 puts the duty of the plaintiff with reference to the question under consideration on the same footing as that of the defendant, extensive as that had been, as laid down in the Sivaganga case (*Srimut Rajah Moottoo Vijaya* **[99]** *Raganatha Bodha Gooroo Sawmy Periya Odaya Taver* v. *Katama Nachiar* (1),—all these are strong indications to show that the intention was to enlarge the scope of estoppel by record beyond the limits that would be admissible if the term 'cause of action' were construed in its literal and most restricted sense which, in *Krishna Behari Roy* v. *Brojeswari Chowdranee* (2), the Judicial Committee, said should not be done. In this state of the law what matters might and ought to have been brought forward will depend upon the particular facts of each case. One test, as suggested by the Judicial Committee, is whether the matters are so dissimilar that their union might lead to confusion (*Kameswar Pershad* v. *Rajkumari Ruttan Koer* (3). In the present instance it is quite clear that no such confusion could have arisen had the want of sanction been brought forward along with fraud in the previous suit, nor has any other valid objection been suggested against the two grounds being then combined. It would follow, therefore, that the want of sanction in question might and ought to have been made a ground of attack in original suit No. 48 of 1882 and should be taken to have been in issue in that suit as laid down in Explanation II to Section 13.

As regards the last argument of the Advocate-General it would be quite permissible to reply that Explanation II, in authorizing a fiction that the matter contemplated was in issue, necessarily implies the further fiction that it was also adjudicated upon. But it is more satisfactory to say that the estoppel in question is different from that raised by an actual decision. In truth, the estoppel is that what might and ought to have been relied on in a former suit as a ground of attack or defence but was not, could not, in subsequent litigations between the parties, be brought forward for such purposes; and it is scarcely necessary to add that, notwithstanding the objections taken in some of the cases to the soundness of this doctrine, there is no doubt that it is founded on unquestionable grounds of expediency and public policy.

Before concluding, it is also well to point out that, assuming that the limited construction proposed by the Advocate-General were the correct one, even then, the cause of action on which the suit of 1882 was based, must clearly be held to be identical with that in the present suit. For, looking to the substance of the two actions, the dispute then was and now is as to the validity of the **[100]** compromise embodied in the decree in suit No. 42 of 1879. No doubt the invalidity was sought to be established in the suit of 1882 on one ground, while in this suit it is sought to be established on another ground. But these grounds are only different means

(1) 11 M.I.A. 50. (2) 2 I.A. 283. (3) 20 C. 79.

invoked for making out what is manifestly a single and indivisible infringement of the self-same right. 1897 Nov. 16.

In either view, therefore, the conclusion must be that the plaintiff is debarred from relying on the want of sanction in question. APPELLATE CIVIL.

It is, therefore, not necessary to discuss the question of limitation. But if it were, we should decide that the suit was instituted within three years from the time the plaintiff attained his majority.

The appeal fails and is dismissed with costs. 21 M. 91= 8 M.L.J. 28.

DAVIES, J.—I concur throughout.

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**21 M. 100=8 M.L.J. 14.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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SALEMMA (*Plaintiff*), *Appellant v.* LUTCHMANA REDDI AND ANOTHER (*Defendants*), *Respondents.**

[22nd April, and 26th October and 30th November, 1897.]

*Hindu Law—Stridhanam—Law of Inheritance—Enfranchisement of service Inam,*

Land which formed the emolument of the office of moniegar was enfranchised in favour of a Hindu woman, who died leaving her surviving defendant No. 2 (her husband), the plaintiff (her unmarried daughter), and two sons and two married daughters who were not parties to this suit. The plaintiff sued to recover the land to which she claimed to be entitled under the Hindu Law of Inheritance:

*Held*, that the property belonged to the deceased as her stridhanam descendible to her heirs, and (without deciding what control, if any, defendant No. 2 had over the property) that the plaintiff was entitled to succeed according to the law of inheritance applicable to such property.

[F., 23 M. 47 (48); Appl., 36 M. 116 (119)=21 M.L.J. 850 (855)=10 M.L.T. 494 (496)=(1911) M.W.N. 168; R., 29 M. 358=1 M.L.T. 68.]

SECOND appeal against the decree of E. J. Sewell, Acting District Judge of North Arcot, in appeal suit No. 336 of 1895, reversing the decree of T. Swami Ayyar, District Munsif of Chittore, in original suit No. 395 of 1894.

This was a suit for land brought by the plaintiff who was the unmarried daughter of one Ellammal, deceased, and defendant No. [101] 2. Defendant No. 1 was the brother of defendant No. 2. The cause of action was stated to be that defendant No. 1, at the instigation of defendant No. 2, had taken unlawful possession of the land in question. This land had originally formed the emolument of the office of moniegar and had been enfranchised, under circumstances which did not appear, in favour of Ellammal, and the plaintiff now sued to recover them as separate property of her mother who left besides the plaintiff two sons and two married daughters. Defendant No. 2 contended that the property for which the inam title deed had been granted to Ellammal could not be regarded as her private property on that account in the sense that the plaintiff could succeed to it, and that it virtually belonged to the family of the defendants and had been enjoyed by them in common for sometime and since been divided between them, and that hence the plaintiff had no right to the recovery of the portion of the share which fell to the first defendant's share.

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* Second Appeal No. 397 of 1896.

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The only issue that was framed was as follows:—"Whether the disputed lands were the private property of the deceased Ellammal and "whether the plaintiff is entitled to succeed to them." The District Munsif answered this question in the affirmative and passed a decree as prayed. On appeal, the District Judge referred to *Venkatarayadu* v. *Venkataramayya* (1) and Mayne's Hindu Law, § 616, and reversed the decree appealed against and dismissed the suit.

The plaintiff preferred this second appeal.

*Jambulinga Mudaliar* and *Sivagnana Mudaliar*, for appellant.

*Tiagaraja Ayyar*, for respondent No. 1.

## JUDGMENT.

The land in dispute formed part of the emoluments attached to the office of *maniem* in a Government village. The second defendant formerly held the office, but having been found guilty of embezzlement he was dismissed. The land was a few years afterwards enfranchised in favour of his wife Ellammal since deceased. With reference to the issue remitted for trial, *viz.*, what right, if any, and under what circumstances the land was enfranchised in favour of Ellammal, the District Judge states in effect that the evidence does not enable him to do more than find that the enfranchisement took place, because Ellammal was in possession of the land at the time.

[102] The District Munsif gave a decree to the plaintiff, being of opinion that she, as the unmarried daughter of Ellammal, was her heir and entitled to the property. But the District Judge, on the strength of an observation contained in Section 616 of Mayne's Hindu Law, held that the property, though acquired by Ellammal, became on her death the second defendant's in his sole right and that the plaintiff had no title to it.

The chief authority relied on in support of the Lower Appellate Court's decision is a text of Katyayana (2). As translated it runs thus:—"Wealth acquired by mechanical arts or received through affection from "any but the kindred is subject to the husband's dominion. The rest "is stridhanam."

Whether an acquisition such as that in the present case falls within either of the two classes mentioned in the text is open to doubt. For it can scarcely be said with any degree of accuracy, that the land was acquired by mechanical arts or was received through affection entertained by the Government towards Ellammal. But it has been suggested that the text was intended to cover all acquisitions which are not stridhana in the technical sense of the term as understood by Smriti writers. We propose, therefore, to deal with the present case on the supposition that it comes within the spirit of the rule laid down by the text.

The first question then that arises is, in whom is the ownership of property of the kind mentioned in the text—is it in both husband and wife or in which of the two?

The language of the text may seem to vest the ownership in the husband. But it being well established that whatever may be the law intended to be laid down by the Smriti writers, that law must be sought for in the writings of the commentators; we have to look to what those commentators, who are authorities in this part of India, have said on the subject.

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(1) 15 M. 284. (2) Dayabhaga, Ch. IV, Sec. 1, § 19.

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At the outset we may state that no commentator, known to us by name, has said that the ownership vests in both husband and wife. But Mr. Mayne, in the line of devolution pointed out by him, would seem to assume the joint ownership of both. In support of this, he refers to Jagannatha, Colebrook's Digest, Madras Reprint, Vol. II, page 628. No doubt we find therein a statement that the property goes to the survivor and afterwards passes to his or her heirs. But Jagannatha simply mentions this **[103]** as the opinion of certain lawyers. Who these are does not appear. Jagannatha's own opinion, as will be shown further on, would seem to be different. Under these circumstances it is not safe to assume the joint ownership so as to allow the survivor to take the property.

If the property does not belong to both, to whom then according to the commentators does it belong? First and foremost comes the Mitakshara. It is significant to note that Vijnaneswara does not refer to the text at all, nor was it necessary for him, in the view he took of the subject of stridhanam, to refer to it. For according to him (Chapter II, Section 11) whatever is lawfully acquired in any manner by a woman married or not—is her stridhanam. The Smriti Chandrika (Chapter II, Section 1, § 16), however, does not seem to recognise property of the kind mentioned in the text as her stridhanam. (The translator of the work was evidently of that opinion, page 120.) The Madhaviya (§ 50: Burnell's translation, page 42), and Varadaraja's Vyvaharanirnayam cite the text, but express no opinion on it. The Sarasvati Vilasa like the Mitakshara does not refer to the text and would seem to follow the Mitakshara. The author of the Viramittrodaya expressly recognises such property as her stridhanam. For he says (Chapter V, Part I, § 2) "the answer is, in the above texts" (one of which is that in question) "the "denial is, not of their being woman's property, but of its consequences, "such as distribution (by her choice amongst her heirs), &c. Accordingly "in the latter text" (the one in question) "it is said, therein the husband's "ownership arises. The meaning is that the husband and not the woman "has independence in dealing with such property." (Golapchandar Sircar's translation, page 222.) In this state of the authorities, when there is not such a consensus of opinion among the commentaries prevalent in this part of India as to suggest that the law of the Mitakshara on the point was not recognised or was departed from, it seems to us to be best to follow the Mitakshara. No doubt, judicial decisions have established that property inherited by a woman is, notwithstanding the opinion of Vijnaneswara to the contrary, not stridhanam. But those decisions do not go the length of holding that Vijnaneswara's doctrine as to stridhanam is otherwise unsustainable.

It is scarcely necessary to say that Vijnaneswara's statement that stridhanam is not to be understood in a technical sense **[104]** (Mitakshara, Chapter II, Section 11, § 3) was not mere philological observation. By laying down that proposition, Vijnaneswara and other great commentators, who followed him, succeeded in effecting a beneficial change in the archaic Smriti law and placed women almost on a footing of equality with men as regards the capacity to hold property. It is on account of the boldness and reach of mind evinced by Vijnaneswara, as pointed out by Messrs. West and Bühler Digest, page 291, note (*a*), 3rd edition, in propounding his doctrine of stridhanam and his other theories that property is a matter of secular not of religious cognizance and sapindaship rests on consanguinity that the Mitakshara has become the chief authority on

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Hindu Law. A departure from the law, laid down by such a high authority, must not be made unless supported by adequate grounds. And as no such grounds exist, we hold that the property in the present case belonged to Ellammal and was her stridhanam descendible to her heirs. This conclusion is in accordance with that of Jagannatha who is relied upon by Mr. Mayne in support of his view. After referring to the opinion of certain lawyers as noticed above, Jagannatha says in the paragraph immediately following, "but, according to Jimutha Vahana Raghunandana "and the rest, the wife is the sole owner of wealth acquired by her even "during coverture: yet she has not independent power over it so long as "her husband lives; for the negative in the text of Manu (Book III, "Chapter 1, verse 52), conveys the sense of imperfection. Consequently, "they have no wealth exclusively their own, and the imperfection of "their property consists in the want of uncontrolled power. It must be "therefore understood that the legal heirs of a woman's peculiar property "succeed also to this wealth." (Colebrook's Digest of Hindu Law, Madras Reprint, Vol. II, page 628. See Banerjee's Marriage and Stridhanam, page 319, 2nd edition, also page 439.).

The next question is who is the heir to the property? No special rule as to the devolution of the property comprised in the text of Katyayana is laid down in any of the commentaries. In this matter of the devolution of stridhana too, as in the comprehensive character of the definition of stridhanam, the superiority of the Mitakshara is evident. While the other commentators, in their attempt to reconcile the various Smritis, complicate the matter by prescribing different lines of devolution —those too not [105] complete—according to the class of stridhanam to which the particular property belongs, the Mitakshara lays down rules which are easy of application, complete in themselves and on the whole equitable. We think therefore we ought to follow the Mitakshara and hold that the plaintiff is the heir.

It only remains to observe that though, as we have seen, a wife's earnings and gifts to her by strangers are her stridhanam descendible to her heirs, yet a question may arise whether her husband has any and what control over such property. The question however does not arise in this case and it is unnecessary to consider it.

The decree of the Lower Appellate Court is reversed and that of the District Munsif restored. The Appellant's costs in this and in the Lower Appellate Court must be paid by the first defendant.

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21 M. 105.

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

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SRIDEVI (*Defendant No.* 1), *Appellant v.* KRISHNAN AND OTHERS (*Plaintiff and Defendants Nos.* 2 *to* 4), *Respondents.**
[30th September, and 1st October, 1897.]

*Pensions Act—Act* XXIII *of* 1871, *Section* 12—*Political pension of Zamorin of Calicut* —" *Payable* "—*Power of disposition by will.*

The Zamorin of Calicut, whether he be or not a member of a Kovilagom, is entitled to dispose of his separate property by a will.

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* Appeal No. 125 of 1896.

The Zamorin, by his will, bequeathed to the plaintiff the malikhana due to him from the Government which might be in arrears at the time of his death. The malikhana was a political pension of Rs. 6,000 a month, payable quarterly. The Zamorin died on the 6th of August 1892. The plaintiff having obtained a certificate under Pensions Act, Section 6, now sued the new Zamorin to recover the proportionate amount of the pension for the current quarter up to the time of the Zamorin's death:

*Held*, that the plaintiff was not entitled to recover the amount sued for.

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APPEAL against the decree of A. Venkataramana Pai, Subordinate Judge of South Malabar, in original suit No. 22 of 1895.

The plaintiff sued for Rs. 8,391-9-6, together with interest from the 24th February 1893. The nature of the suit appears from the following passage from the judgment of the Subordinate Judge:—

"**[106]** The late Zamorin, Maharaja Bahadur of Calicut, died on "6th August 1892. The Zamorin, for the time being, enjoys a malikhana "of Rs. 6,000 a month, payable quarterly. The late Zamorin died before "the quarterly instalment fell due. Rs. 8,391-9-6 represents the propor-"tionate amount due for the portion of the quarter up to the date of his "death. After the death of the late Zamorin, the Collector paid the "amount, on the 24th February 1893, on the present Zamorin's receipt, "to the first defendant, who is the senior Tamburatti of the Pudia-"kovilagom to which the deceased belonged. The plaintiff, nephew of the "deceased, has since obtained a certificate (Exhibit G, dated 4th July "1895) under Section 6 of the Pensions Act, 1871, and sues to recover the "amount from first defendant on the grounds (1) that the deceased has "bequeathed it to him by will (Exhibit A, dated 3rd August 1892); (2) "that even in the absence of the will A, the amount would go to their "Tavazi or branch of the Pudiakovilagom, of which he is the present head "and manager; and (3) that such arrears of malikhana are, according to "family custom, spent for the obsequies of the deceased malikhana-holder, "and he (the plaintiff) has performed the obsequies of the late Zamorin "at his own cost. The first defendant denies everyone of these positions."

The Subordinate Judge passed a decree for the principal sum and interest at 6 per cent. instead of 12 per cent.

Defendant No. 1 preferred this second appeal.

*Sundara Ayyar*, for appellant.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*) and *Govinda Menon*, for respondent No. 1.

*Govindan Nambiar*, for respondent Nos. 2 and 3.

*Subramania Ayyar*, for respondent No. 4.

## JUDGMENT.

In the Court below, the plaintiff claimed the amount of the pension in dispute in his own right under the will left by the late Zamorin in his favour.

He also claimed the money on behalf of the Tavazi to which he formerly belonged, and of which he was *de facto* manager.

In the appeal here, the Advocate-General put forward another ground, namely, that apart from the will the plaintiff was entitled to the money as the nearest heir to the last Zamorin. This new ground, in order to be considered, would reqiure further enquiry, and we cannot therefore permit it to be raised now.

**[107]** As to the second of the grounds on which the suit was based in the Lower Court, it is clearly not maintainable, because the certificate

1897 OCT. 1. — APPELLATE CIVIL. — 21 M. 105.

granted to the plaintiff under the Pensions Act permitted him to sue only in his own right and under the will. No leave was given to the Tavazi to sue. Even if it had been otherwise, we would have held that the plaintiff was not entitled to sue on behalf of the Tavazi as at the date of the plaint, he had ceased to belong to it, having become a stani. The fact that he was subsequently allowed to manage the affairs of the Tavazi constituted him only its agent. That would, of course, not give him a right to represent the Tavazi, so as to proceed under Section 30 of the Code of Civil Procedure, he not having the same interest as the members of the Tavazi, if they had any.

The only remaining point is whether the plaintiff is entitled to the money under the will was impeached on several grounds. It was first contended that the Zamorin was subject to the *Marumakattayam* Law, and it was therefore not competent to him to execute a will even in respect to his separate property. The right to dispose of separate property by testamentary disposition is a right now recognized as vested in every Hindu, and without evidence of custom or usage to the contrary, among Malabar Hindus, there can be no reason for holding that the general rule is inapplicable to them. We should therefore hold that the Zamorin had the power to will away his separate property, which the amount in dispute admittedly was, even though the Zamorin was also a member of an undivided family—to wit, his Kovilagom. In fact, however, he was not that. His will is, therefore, unquestionably not open to objection on the ground stated. It was next contended that the transfer of the pension money made in the will was null and void under Section 12 of the Pensions Act. There is no doubt the pension was a political pension, being an allowance granted by the Government, not in respect of a right, but as a matter of favour to the Zamorin, after his deposition from the Raj, as the engagement between him and the Government clearly shows (*vide* 'Logan's Collection of Treaties and Engagements relating to Malabar,' pages 372 to 376). See also *The Secretary of State for India in Council* v. *Khemchand Jeychand* (1). Section 12 is, therefore, applicable to the case, if the amount bequeathed by the will was "money not payable" at the time of the will became operative. **[108]** It is not denied that the day appointed for the payment of the quarterly allowance, of which the plaint amount forms part, had not arrived at the time of the Zamorin's death. The money was not disbursable from the Government treasury until a month or more afterwards. If, therefore, the expression "payable" in Section 12 means ripe for disbursement or that payment was demandable, the will was doubtless invalid. It was, however, urged by the Advocate-General that the proper construction of the word was that the right to the money had accrued, and hence was "payable," even though the actual payment of it could not be demanded till a later date. We are unable to accept this construction. We think the word payable is used in its primary sense, namely, deliverable in performance of an obligation, in other words that actual payment was demandable by the person entitled. We must therefore hold that the will was invalid under Section 12 of the Pensions Act. Further, supposing the transfer did not fall under the prohibition in Section 12 of that Act, the case would be governed by Clause (9) of Section 6 of the Transfer of Property Act, which declares that political pensions cannot be transferred." There is no conflict between this clause and any provision of the Pensions Act, because there is nothing in the latter Act empowering alienation of a political pension, in

(1) 4 B. 432.

cases in which Section 12 may not be applicable. If such power of transfer existed, it must have been under the general law, and it is expressly taken away by the Transfer of Property Act. It is scarcely necessary to observe that, as the law of testamentary disposition among Hindus has been treated simply as a development of the law of gift *inter vivos* the principles applying to the latter, under Section 6 of the Transfer of Property Act, must be held equally applicable to the former, that is to say, that what cannot be given in life, cannot be given by will. For these reasons we find that the plaintiff derived no title to the money under the will. It therefore becomes unnecessary to express an opinion whether, if the plaintiff had a right, his action lay against the Zamorin and not against the first defendant as was contended on behalf of the latter.

The appeal must accordingly be allowed and in reversal of the Lower Court's decree, the plaintiff's suit must be dismissed with costs of first defendant throughout.

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**[21 M. 109.**

## [109] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

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VAIRANANDA NADAR (*Plaintiff*) *v.* MIYAKAN ROWTHER (*Defendant*).*
[3rd September, 1897.]

*Registration Act—Act III of* 1877, *Section* 17 (*d*)—*Transfer of Property Act—Act IV of* 1882, *Sections* 4 *and* 107—*Lease of a shop for three years—Registration.*

Leases falling under Section 107 of the Transfer of Property Act are compulsorily registrable notwithstanding the Government notification issued under the proviso to Section 17 (*d*) of the Registration Act.

[F., 32 M. 532=4 Ind. Cas. 1039 (1040)=6 M.L.T. 175; R., 35 M. 95 (99)=8 Ind. Cas. 668=21 M.L.J. 202=8 M.L.T. 437.]

CASE stated for the opinion of the High Court under Civil Procedure Code, Section 617, by V. M. Malbari Rau, District Munsif of Tuticorin, in small cause suit No. 73 of 1889.

The question submitted was whether a lease of a shop for a term exceeding one year was compulsorily registrable. This was a suit to recover Rs. 51 being the arrears of rent accrued due on a shop leased by the plaintiff to the defendant. The letting was evidenced by a document, dated the 12th April 1883, and executed by the defendant. The period provided for was three years and the rent reserved was Rs. 2-8-0 a month. In referring the above question the District Munsif said "under Transfer of Property Act, Section 107, a lease of immoveable property from year to year "or for any term exceeding one year or reserving a yearly rent can be made "only by registered instrument. This Section is to be read as supplemental "to the Indian Registration Act—see Section 4; while Section 17 (*d*) of "the latter Act declares such leases to be compulsorily registrable, except "where under the power thereby conferred the Local Government exempts "from its operation leases for terms not exceeding five years and for rent "not exceeding Rs. 50. The Government in the exercise of the power "so conferred have exempted such leases from registration—Rajagopalier's "Registration Act, page 51—G. O., No. 1763, dated 4th November "1873. The plaintiff contends that under the above ruling of the

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* Referred Case No. 16 of 1897.

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"Government, the lease was exempt from compulsory registration. "Reading all the provisions together, I am disposed to think that, "[110] in places where the Transfer of Property Act is in force, all leases "for a term exceeding one year are compulsorily registrable. The order "of Government was passed when the Act VIII of 1871 was in force and "applied to all leases which reserved an annual rent less than Rs. 50 and "extended for a term of not more than five years. When Act IV of 1882 "was passed, this notification became abrogated so far as leases other than "agricultural were concerned, as Section 107 requires leases for terms of "more than a year to be registered. What little doubt there was about "registration was removed by Act III of 1885, which directs that the "Transfer of Property Act shall be read as supplemental to the Indian "Registration Act. In this view I am supported by the opinion expressed "in 'Field's Evidence,' fifth edition, page 446."

Mr. *J. Adam*, for plaintiff.

*Ramakistna Ayyar*, for defendant.

## JUDGMENT.

Section 107 of the Transfer of Property Act is declared to be read as supplemental to the Registration Act. It is therefore to be read with Section 17 (*d*) of the Registration Act. The proviso to that clause must, therefore, be restricted to cases not falling under Section 107 of the Transfer of Property Act, which absolutely requires the registration of the leases referred to therein. Our answer to the question therefore is that leases falling under Section 107 of the Transfer of Property Act, are compulsorily registrable notwithstanding the Government notification issued under the proviso to clause (*d*), Section 17 of the Registration Act.

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**21 M. 110=8 M.L.J. 62.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

KANARAN AND ANOTHER (*Plaintiffs*), *Appellants v.* KUTTOOLY AND ANOTHER (*Defendants*), *Respondents.**
[14th September and 4th November, 1897.]

*Mortgage—Agreement by mortgagor to sell the mortgage promises to the mortgagee—Fetter on the equity of redemption.*

A stipulation in a mortgage, that if the mortgage money is not paid on the due date the mortgagor will sell the property to the mortgagee at a price to be [111] fixed by umpires, is unenforceable as constituting a fetter on the equity of redemption.

[F., 11 Ind. Cas. 519 (521)=128 P.L.R. 1911; R. 24 M. 449 (461); 39 P.R. 1907=119 P.L.R. 1907; 126 P.L.R. 1908=54 P.W.R. 1908; 154 P.L.R. 1901.]

SECOND appeal against the decree of B. Macleod, Acting District Judge of North Malabar, in appeal suit No. 132 of 1896, confirming the decree of V. Raman Menon, District Munsif of Quilandy, in original suit No. 1 of 1895.

The plaintiff No. 1 was the karnavan of the tarwad to which defendant No. 1 belonged, and the plaintiff No. 2 was a lessee under plaintiff No. 1. In 1882 the predecessor of the plaintiff No. 1 mortgaged

* Second Appeal No. 33 of 1897.

certain property to the defendant No. 1 under a document filed as Exhibit I in the suit. The present suit was brought to redeem this mortgage. Defendant No. 2 was a tenant under the mortgagee. The defendant relied upon a stipulation in Exhibit I to the effect that if the mortgage was not paid off within three years from the date when it was executed, the mortgage premises should be sold to her for a price to be settled by umpires, and she claimed that as the mortgage had not been discharged, she was entitled to enforce the contract to sell the properties to her. The District Munsif dismissed the suit and his judgment was confirmed on appeal by the District Judge.

1897 Nov. 4. — APPELLATE CIVIL. — 21 M. 110 = 8 M.L.J. 62.

The plaintiff preferred this second appeal.

*Narayanan Nayar*, for appellants.

*Ryru Nambiar*, for respondent No. 1.

## JUDGMENT.

The most important question in the case is whether the agreement in the mortgage (Exhibit I) to sell the mortgaged property to the mortgagee in default of payment of the mortgage money is binding upon the mortgagor. Neither of the Courts below has considered this question. They have proceeded to deal with the agreement of sale as if it were valid. On the question as to its validity we have no hesitation in holding against it.

It is the policy of the law that the right of redemption in a mortgagor shall not be fettered or clogged in any manner or to any extent by an agreement between mortgagor and mortgagee, saving transactions between the parties as would operate as an extinguishment of the right. (See proviso to Section 60 of the Transfer of Property Act)—a transaction to have this effect must naturally be one entered into after the mortgage. (See *Perayya* v. *Venkata* (1)).

**[112]** The present case is no doubt not governed by the terms of the Transfer of Property Act, the mortgage being prior to it, but at the date of the mortgage the law was substantially the same. Since 1858 the principles applicable to mortgages in this Presidency are those administered by the Courts of Equity in England, according to which agreements derogating from the right of redemption are treated as unenforceable. This principle is most strongly illustrated in the case of mortgages by conditional sale where the condition is held by the Courts to be inoperative. For other instances of the application of the principle, it is sufficient to refer to the cases of *Mahomed Muse* v. *Jijibhai Bhagvan* (2) and *Sayad Abdul Hak* v. *Gulam Jilani* (3) and to two recent English cases (*Field* v. *Hopkins* (4) and *Salt* v. *Marquess of Northampton* (5)). In this case the effect of the agreement was practically to deprive the mortgagor of the right to redeem after three years. The agreement must therefore be held to be invalid, and the defendants' contention that plaintiffs are precluded by the above agreement from seeking to redeem fails. It becomes unnecessary to consider the other objections taken to the validity of that agreement.

The result is that the second plaintiff will be entitled to redeem if the lease to him by first plaintiff is binding on the tarwad, and if it is not, the first plaintiff will be entitled to redeem on an amendment of the plaint to that effect. The Lower Appellate Court has not given a finding on the fourth issue which refers to the validity of the lease to second plaintiff. The District Judge will now submit a finding upon it on the

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(1) 11 M. 403. (2) 9 B. 524. (3) 20 B. 677.
(4) L. R. 44 Ch. D. 524. (5) (1892) App. Cas. 1.

1897 Nov. 4. — Appellate Civil. — 21 M. 110 = 8 M.L.J. 62.

evidence on record, within one month from the date of the receipt of this order. Seven days will be allowed for filing objections after the finding has been posted up in this Court.

[The District Judge found that the lease was valid and in the result the High Court reversed the decrees of both the Lower Courts, and ordered that a redemption decree be drawn up in favour of second plaintiff on payment by either plaintiff of Rs. 75 to first defendant.]

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21 M. 113 = 8 M.L.J. 4.

## [113] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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THE COLLECTOR OF VIZAGAPATAM, *Petitioner v.* ABDUL KARIM SAHIB AND ANOTHER (*Plaintiffs*), *Respondents.**
[6th December, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Sections* 412, 622—*Dismissal of suit* in forma papuris *without trial—Liability of plaintiff for Court-fee—Revision.*

A plaintiff who sues *in forma pauperis* is liable to pay the stamp duty if his suit is dismissed without trial; and he may be ordered to do so under Section 622.

[R., 29 B. 104 = 6 Bom. L.R. 1122; 23 M. 73 (79).]

PETITION under Civil Procedure Code, Section 622, praying the High Court to revise the proceedings of E. C. Rawson, Acting District Judge of Vizagapatam, in original suit No. 5 of 1895.

This was a suit instituted *in forma pauperis*, which was dismissed without contest on the 25th August 1896 against defendants Nos. 1 to 6 without costs, the plaintiffs being ordered to pay costs to defendant No. 7. A question arose whether the stamp duty was payable by the plaintiff and notice was served on the Collector. The District Judge made no order against plaintiff for payment of Court-fees. He said "this case "appears to be on all fours, except that the suit proceeded as far as the "final hearing instead of only as far as the settlement of issues, with the "case of *The Collector of Kanara* v. *Krishnappa Hedge* (1) where it was "decided that Section 412 of the Civil Procedure Code applied only to "cases of adjudicated failure, and that there was no adjudication of the "rights of the parties, and the plaintiff could not, therefore, have been "said to have failed in the suit; the case did not fall within the section "at all."

This revision petition was preferred on behalf of the Secretary of State for India in Council represented by the Collector of Vizagapatam.

The Government Pleader (Mr. *E. B. Powell*), for petitioner.

Plaintiffs were not represented.

### JUDGMENT.

The Bombay case relied on by the District Judge has been dissented from by this Court in *Lakshmikantam* v. *Lakshmi*-[114]*devamma* (2). Sir T. Muttusami Ayyar there observed:—"The words in the sections "are 'succeeds' and 'fails in the suit' and they refer to the ultimate de-"cision or the result of the suit and not to the mode in which the deci-"sion is arrived at. I should be doing violence to the language of the

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* Civil Revision Petition No. 73 of 1897.

(1) 15 B. 77. (2) Referred Case No. 12 of 1893 (unreported).

"section if I introduced into them the words 'after contest' which I do "not find in them." We see no reason to dissent from this view.

1897 DEC. 6. — APPELLATE CIVIL. — 21 M. 113= 8 M.L.J. 4.

We accordingly allow the petition and direct that the plaintiffs in the suit do pay the Collector the stamp duty payable on the plaint and the costs of this application.

We have dealt with this matter under Section 622, Civil Procedure Code, as we are of opinion that the District Judge has failed to exercise a jurisdiction vested in him by law in consequence of a misconstruction placed by him on Section 412, Civil Procedure Code.

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21 M. 114=2 Weir 470.

## APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

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QUEEN-EMPRESS v. RAMASAMI.* [29th September, 1897.]

*Criminal Procedure Code—Act X of* 1882, *Section* 419—*Presentation of Criminal appeal.*

A petition of appeal under the Criminal Procedure Code is not duly presented when having been signed by a pleader, it is handed in by a person who is not his clerk and over whose conduct and actions he has no control.

[F., 5 Ind. Cas. 330 (331).]

PETITION under Criminal Procedure Code, Section 439, praying the High Court to revise the order of A. R. Cumming, Head Assistant Magistrate of Kistna.

The order sought to be revised was an order rejecting certain appeals against the convictions of the appellants by the Second-class Magistrate of Jaggiapet. The Head Assistant Magistrate said :—"This batch of "appeals was presented to me at Jaggiapet [115] by some person whose "identity is unknown to me. The vakalats are drawn in the name of A. "B., who was a certified vakil, and in the name C. D. who is not. The "appeals were not presented by the former, and they could not be properly "presented by the latter."

*Narayna Ayyangar*, for the petitioners.

The Public Prosecutor (Mr. *E. B. Powell*), for the Crown.

## JUDGMENT.

The cases decided by this Court do not go further than to hold that, if an authorized pleader present an appeal by the hand of his clerk, the presentation should be accepted as if made by the pleader himself. It has nowhere been held that a pleader may present an appeal by a person who is not his clerk and over whose conduct and actions he has no control.

We cannot therefore say that the Head Assistant Magistrate was wrong in rejecting these appeals.

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* Criminal Revision Cases Nos. 256 to 263 of 1897.

1897 Nov. 26.

APPELLATE CIVIL.

21 M. 115.

21 M. 115.

## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.*

RASIBI AMMAL (*Plaintiff*) *v.* OLAGA PADAYACHI (*Defendant*).*
[26th November, 1897.]

*Village Courts Act (Madras)—Act I of* 1889—*Succession Certificate Act—Act VII of* 1889.

The provisions of the Succession Certificate Act apply to suits in a Village Munsif's Court.

CASE stated under Section 19 (3), Act VII of 1889, by W. J. Tate, District Judge of Salem, in original suit No. 15 of 1897, on the file of the Village Munsif of Puthrakoundanpaliam, Atur taluk.

The case was stated as follows :—

The Village Munsif has applied to me for instructions as to how he should proceed in a suit filed in his Court, where the plaintiff, a Hindu widow, sues to recover money due under a document executed to her husband, aud the defendant objected that she cannot sue without a succession certificate in respect of the debts [116] of the deceased. The wording of Section 4 of the Succession Certificate Act seems to imply that Village Courts are not exempted from the operation of the Act, nor is there any such expression in the Village Act—Act I of 1889. The question is one affecting general practice. I have the honour to solicit the orders of the High Court as to whether the provisions of Section 4 of the Succession Certificate Act apply to suits and applications under the Madras Village Courts Act or not.

The parties were not represented.

This case coming on for hearing ; upon perusing the letter of reference and the records in original suit No. 15 of 1897 on the file of the Village Munsif of Puthrakoundanpaliam, Atur taluk, and the parties not appearing in person or by counsel, the Court expressed the following opinion.

## OPINION.

We are of opinion that the provisions of the Succession Certificate Act apply to suits in the Village Munsifs' Courts.

* Referred Case No. 23 of 1897.

21 M. 116 (F.B.) = 8 M.L.J. 43.

1897 DEC. 15.

FULL BENCH.

21 M. 116 (F.B.) = 8 M.L.J. 43.

## APPELLATE CIVIL—FULL BENCH.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Subramania Ayyar, Mr. Justice Davies, and Mr. Justice Benson.*

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LAKSHMINARAYANA PANTULU (*Plaintiff*), *Appellant v.* VENKATRAYANAM AND OTHERS (*Defendants*), *Respondents.**
[8th July and 13th September and 14th, and 15th December, 1897.]

*Rent Recovery Act (Madras)—Act VIII of* 1865, *Section* 3—*Mokhassa-inamdars paying kattubadi to the Zamindar—Obligation to accept patta.*

Mokhassa-inamdars, who hold lands in a zamindari and pay kattubadi annually to the Zamindar and who are not cultivating tenants, are not bound to accept a patta from the Zemindar.

[F., 27 M. 465 = 14 M.L.J. 81; 30 M. 493 = 17 M.L.J. 473; R., 22 M. 11; 29 M. 79 = 15 M.L.J. 361; 16 M.L.J. 489.]

SECOND appeal against the judgment of E. C. Rawson, Acting District Judge of Kistna, in appeal suit No. 2114 of 1893, reversing the decision of F. C. Parsons, Acting Head Assistant Collector of Kistna, in summary suit No. 1694 of 1893.

The plaintiff, who was the Zamindar of Telaprole, sued by his next friend under Rent Recovery Act, 1865, to enforce the [117] acceptance of a patta by the defendant, who was the Mokhassadar of Chatrazi, within the limits of the plaintiff's zamindari. The Head Assistant Collector decided in favour of the plaintiff. The District Judge reversed his decision on appeal.

The plaintiff preferred this second appeal. The second appeal came for hearing before COLLINS, C.J., and SHEPHARD, J., who referrred to the Full Bench the following question :—

Whether the defendants not being (as is assumed) cultivating tenants, are bound to accept a patta from the Zamindar. (See *Suryanarayana* v. *Appa Rau* (1) and cases cited.)

The case came on for hearing before the Full Bench constituted as above.

*Pattabhirama Ayyar*, for appellant.

Mr. *N. Subramaniam*, *Ramachandra Rau Saheb*, and *Sriramulu Sastri*, for respondents.

*Pattabhirama Ayyar.*—The plaintiff in this case is clearly a landholder within the meaning of Section 3 of Act VIII of 1865. The only question, therefore, is whether the defendant is a tenant within the meaning of that Act, for if he is then by Section 9 he is bound to accept a patta. Now a tenant is defined by Section 1 as any person who is bound to pay rent to a landholder. Here the defendant is admittedly bound to pay kattubadi, and therefore the question comes to this, is kattubadi rent or revenue? The nature of kattubadi has been discussed, see *Venkatarama Doss* v. *Maharajah of Vizianagaram* (2), and *Mullapudi Balakrishnayya* v. *Venkatanarasimha Appa Rau* (3). But this discussion has been with reference only to limitation. Kattubadi, however, is

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* Second Appeal No. 939 of 1895.

(1) 16 M. 40. (2) 19 M. at p. 103—Note. (3) 19 M. 329.

1897 Dec. 15. — Full Bench. — 21 M. 116 (F.B.) = 8 M.L.J. 43.

defined as *rent* (Brown's 'Telugu Dictionary'). It is the rent paid by village servants, as for example by a village watchman: and it is in fact the word used in all cases where services are rendered in consideration of only a light rent being imposed for the enjoyment of land. In two cases the question was raised whether a landholder to whom kattubadi was payable was entitled to enforce the acceptance of a patta, but neither of these cases is in point. In *Ramachandra* v. *Jaganmohana* (1), the judgment proceeded on the ground that kattubadi was in fact not payable and the learned Judges expressly declined to consider whether if kattubadi had [118] been payable the acceptance of a patta could have been enforced. In *Rama* v. *Venkatachalam* (2) it was held that the landholder to whom the 'kattubadi' was then payable was not entitled to enforce the acceptance of a patta. The facts of that case are not fully reported, but from the head-note it would seem that the 'kattubadi' then in question was not really kattubadi but quit-rent; and as quit-rent is collected by the landholder as the agent of Government, it is not rent but revenue. [DAVIES, J.—In this case, does not the Mokhassadar himself stand in the shoes of the landlord, and is he not the person who himself has to issue pattas?] He is bound to issue pattas to the cultivating tenants, and so far as they are concerned is a landlord, but at the same time he is also tenant to the zamindar. [SUBRAMANIA AYYAR, J.—If there are two classes of tenants—the cultivating tenant and the non-cultivating tenant—it may well be that Act VIII of 1865 applies only to one class —the cultivating tenant.] Whenever any rent is payable to a landholder, as defined by Section 3, the person bound to make the payment is a tenant, and the Act applies to him. It is true that in *Ramasami* v. *Bhaskarasami* (3), the Privy Council draw a distinction between cultivating tenants and others and say that Act VIII of 1865 seems to apply only to cultivating tenants. But this dictum was not necessary to the decision. The ground on which the Privy Council proceeded was that inasmuch as there was no pre-existing relation of landlord and tenant between the parties to that case, the zamindar was not bound to grant the lease there in question, and it was consequently not a patta. The decision of the Privy Council is referred to in *Ramachandra* v. *Narayanasami* (4). The latest case, however, is *Suryanarayana* v. *Appa Rau* (5), and here the Privy Council case is also considered; and it was held nevertheless that an inamdar who paid jodi was a tenant within the meaning of the Act.

Mr. *N. Subramaniam*.—According to the definition of landholder in Section 1 of Act VIII of 1865, the defendant is a landholder and not a tenant. [DAVIES, J.—The reference assumes him to be a tenant.] I submit he is not a tenant within the meaning of the Act. [COLLINS, C.J.—The reference assumes that he is a tenant within the meaning of the Act and you must argue [119] the case on that assumption.] The defendant is not a cultivating tenant, and according to the ruling of the Privy Council in *Ramasami* v. *Bhaskarasami* (3), pattas and muchilikas need only be exchanged between cultivating tenants and their immediate landlords. This ruling was acted upon in *Rama* v. *Venkatachalam* (2). *Suryanarayana* v. *Appa Rau* (5) is distinguishable, for in that case the person, against whom the acceptance of the patta was enforced, admitted that he was not a landlord; he claimed to be a holder of land with a right of occupancy.

(1) 15 M. 161. (2) 8 M. 576. (3) 2 M. 67. (4) 10 M. 229. (5) 16 M. 40.

JUDGMENT.

1897 DEC. 15. FULL BENCH. 21 M. 116 (F.B.) = 8 M.L.J. 43.

SUBRAMANIA AYYAR J.—The plaintiff is a Zamindar and is therefore undoubtedly a landholder mentioned in Section 3 of the Rent Recovery Act (VIII of 1865). The defendants own a village in the plaintiff's zamindari as mokhassa-inamdars, and as such they have to pay kattubadi or fixed money rent annually to the plaintiff.

The learned counsel for the defendants urged that they being inamdars, ought not to be held to be, within the meaning of the Rent Recovery Act, tenants in any sense.

This contention is however opposed to the course of decisions since 1883. In *Appasami* v. *Rama Subba* (1), it was held that an inamdar who paid quit-rent to a supeior inamdar, was in respect of that quit-rent liable at the instance of the superior inamdar to be summarily proceeded against under the Act as a tenant. In *Subbaraya* v. *Srinivasa* (2), it was ruled that a permanent lessee of a village forming part of a muttah—though he was not an agricultural tenant—was nevertheless a tenant within the meaning of Section 12 of the Act, and therefore entitled to institute a summary suit for damages sustained in consequence of his having been unlawfully ejected by the muttadar. In *Baskarasami* v. *Sivasami* (3), the decision was that a Zamindar could under the Act cause the interest of permanent lessee (whose holding was similar in character to that of the lessee in the last case)—to be sold for arrears of rent due under the lease. And lastly in *Suryanarayana* v. *Appa Rau* (4), the Court upheld the contention that a Zemindar could under the Act distrain for arrears of jodi payable by inamdars.

[120] So far as I am aware no doubt has hitherto been thrown upon the view of the law adopted in the above decisions, and I believe that a considerable number of titles has been created under sales held upon the strength of that view of the law. In these circumstances it is I think too late to contend that the defendants are not tenants at all within the meaning of the Act.

Moreover the present Order of Reference, as I understand it, assumes that the defendants are tenants under the Act for some purposes, and only raises the question whether they are tenants falling within Section 3 of the Act and the other sections relating to the exchange of pattas and muchilikas.

Now the language of the leading section, *viz.*, 3, clearly points to tenants who are directly connected with land as cultivators. Unquestionably these are the persons who are sometimes spoken of as cultivating or agricultural tenants but more generally as raiyats. It is this well known and very numerous body of people that the Legislature has all along taken special precautions to protect, for the simple reason that while the agricultural prosperity of the country so much depends on their well being they are peculiarly liable to be oppressed by Zemindars or other landholders who have the right to collect rents from them. One of the measures adopted very early for ensuring the desired protection to raiyats was the compulsory exchange of pattas and muchilikas. In the earliest Regulation relating to the subject, XXX of 1802, the following passage occurs in the preamble "to the end that cultivators and under-tenants of land may "have the benefit and protection of determinate agreements in their "dealings with superior landholders and farmers of land, and it being "necessary to the security and comfort of cultivators and under-tenants

(1) 7 M. 262. (2) 7 M. 580. (3) 8 M. 196. (4) 16 M. 40.

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"that the terms of such agreements should be made specific to the end "that cultivators and under-tenants being sensible of the advantage of "such security may have recourse to them for the prevention of disputes; "wherefore the following rules have been enacted for the execution of "pattas between proprietors or farmers of land, or amils, and under-"tenants, under-farmers, or raiyats." And the opening words of the first section of the said Regulation are "Proprietors and farmers of land shall "enter into agreements with the inhabitants and cultivators of land on the "terms on which they respectively occupy such lands." And though, when the law as to the recovery of rent was consolidated and amended in 1865, [121] the cultivators or raiyats were less liable to be subjected to exactions on the part of the Zemindars than they had been in 1802, yet the needful continuance of the protection secured by the compulsory exchange of engagements had not materially diminished. Consequently the substance of the old law on the point was re-enacted with the important and stringent modification contained in Section 7 of Act VIII to the effect that the patta tendered should be such as the tenant was bound to accept. It is scarcely necessary to add that certain circumstances connected with holdings of raiyats render periodical adjustment of accounts between them and the Zemindar necessary, and the annual exchange of engagements in their case is therefore of great practical importance.

Now before proceeding to consider whether the provisions in the present law relating to pattas and muchilikas extend also to the case of inamdars, such as the defendants, I should make a few observations with reference to the assumption made in Section 3 that, in the case of tenants mentioned therein, there was an existing relation of landlord and tenant which would warrant the application by either party for a written agreement; inasmuch as the learned vakil for the plaintiff, if I understand him correctly, seemed to suggest that that assumption was scarcely true of cultivators or raiyats above referred to. But that the assumption in question has all along been true in respect of the holdings of raiyats generally admits of no doubt as will be seen from *Venkatanarasimha Naidu* v. *Dandamudi Kotayya* (1), where the true origin and character of holdings of raiyats were recently considered. The authorities cited there show that raiyats are neither tenants-at-will nor tenants from year to year, but possess in the lands under their occupation a far more lasting interest, and in fact they are peasant proprietors being entitled to what is known as the kudivaram right as opposed to the melvaram right or the right of the State. That such was the view adopted by the framers of the Rent Recovery Act is clear from the final report, dated the 21st December 1864, submitted by the Select Committee on the Bill which became the Rent Recovery Act. After referring to the Proceedings of the Board of Revenue, dated the 2nd idem, in which the entire history of the relation between Zemindars and [122] raiyats was reviewed, the Committee in paragrahs 4 and 5 of their report observe, "without going so far as to hold "that Zemindars are only farmers or assignees of the public revenue and not "proprietors of their estates, they (the Committee) unanimously concur "with the Board (of Revenue) that the Regulations of 1802 were intended "to protect the rights of occupants of land under Zemindars by fixing the "maximum rent demandable from them, and forbidding their ejectment as "long as that rent was paid. The Committee further hold that Regulations "IV and V of 1822 were passed for the increased protection of such

(1) 20 M. 299.

"occupants of land, in consequence of the passages in the Regulations of "1802 which spoke of a proprietary right being conferred on Zemindars "having led to doubt and misapprehension. No alteration is, therefore, "necessary in the principle of this Bill which was framed on the above "view of the rights of occupants of land under Zemindars" (5 Madras Revenue Register, at pages 116 and 117).

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21 M. 116 (F.B.)= 8 M.L.J. 43.

The above extract furnishes the clue to the assumption which is made in Section 3 and on which stress was laid on behalf of the plaintiff as if it somehow detracted from the view that Section 3 referred only to tenants in the position of raiyats; and in my opinion that assumption is perhaps the strongest argument in favour of that view. For the assumption is not true in respect of any other description of tenants of zemindari lands.

Turning now to the case of inamdars in the position of the defendants, it is obvious that they do not strictly come within either the strict letter or the spirit of the provisions in question. In the first place the inamdars are, it is conceded, not occupants of land but possess only the right to receive rents due by such occupants. Secondly, the inamdars form a comparatively very small class fairly able to look after their own interests in their relation with Zemindars or other superior landholders. Thirdly and lastly, the amount of quit-rent or kattubadi, jodi, poruppu or by whatever other name it might be known, payable by them to Zemindars or others under grants creating the inams being mostly fixed permanently, there is little or no necessity for periodical revision and settlement such as are required between Zemindars and raiyats. Consequently exchange of pattas and muchilikas between Zemindars and inamdars cannot serve any really useful end. On the contrary, though the exchange of such documents between those persons would in truth be nothing more than an idle [123] formality, yet the neglect of it would, so far as Zemindars are concerned, lead to the serious consequence of loss of rent.

For these reasons I think that the provisions contained in Section 3 and the sections which specially refer to it were not intended to apply to inamdars in the position of the defendants.

It remains only to observe that even if a different construction were possible, this Court would be precluded from adopting such a construction by the decision of the Privy Council in *Ramasami* v. *Bhaskarasami* (1). There it was held that a lease of a village granted by a Zemindar to a banker was not a patta within the meaning of the Rent Recovery Act. In the course of their judgment their Lordships observe "Section 3 "seems to be confined to the relation of tenants who are cultivating the "land and their immediate landlords. The whole Act may not be "confined to that class, but the intention appears to be by Section 3 and "the sections which specially refer to it to regulate the relation of "landlords and tenants of that description." These observations were not *obiter dicta*, but were necessary for the decision of the case (see also *Roma* v. *Venkatachalam* (2)).

I would therefore answer the question submitted in the negative.

COLLINS, C. J.—I agree.

DAVIES, J.—I concur throughout.

BENSON, J.—I also concur.

(1) 2 M. 67. (2) 8 M. 576.

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21 M. 124 (F.B.) = 2 Weir 593.

## [124] APPELLATE CRIMINAL—FULL BENCH.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Shephard, Mr. Justice Subramania Ayyar and Mr. Justice Boddam.*

QUEEN-EMPRESS *v.* SRINIVASALU NAIDU AND ANOTHER.* [5th November, 1897 and 7th and 18th January, 1898.]

*Criminal Procedure Code—Act X of* 1882, *Sections* 195 (*b*), 423, 439 *and* 476—*Whether a High Court in revision can revoke an order of a Subordinate Court under Section* 476, *Code of Criminal Procedure.*

A High Court as a Court of Revision, has power, under Section 439, to revoke an order made by a Subordinate Court under Section 476 of the Code of Criminal Procedure.

[F., 34 C. 42 = 11 C.W.N. 125 (127); R., 26 A. 249 (259) (F.B.) = A.W.N. (1904) 15; 26 B. 785 (787); 40 C. 477 (493) = 17 C.L.J. 245 = 17 C.W.N. 647 = 14 Cr.L.J. 197 = 19 Ind. Cas. 197; 6 Cr. L. J. 25 = U.B.R. (1907) 1st. Qr. Cr. P.C., p. 1; 33 M. 48 = 10 Cr. L.J. 420 = 3 Ind. Cas. 934 = 19 M.L.J. 766 (770) = 6 M.L.T. 327; 13 Cr. L. J. 209 (211) = 14 Ind. Cas. 305 = 22 M.L.J. 419 = 11 M.L.T. 367 = (1912) M.W.N. 499; 18 P.R. 1902 = 78 P.L.R. 1902; 5 P.R. 1908 = 103 P.L.R. 1908 = 7 P.W.R. 1908; D., 26 M. 98 = 2 Weir 576.]

THESE were two petitions under Sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of G. T. Mackenzie, Sessions Judge of Coimbatore, dated 11th October 1897, in criminal miscellaneous petitions, Nos. 32 and 33 of 1897, confirming the order of W. C. McMurray, Deputy Magistrate of Ootacamund, dated 23rd September 1897, and made under Criminal Procedure Code, Section 476, for the prosecution of the petitioners under Section 193, Indian Penal Code, for giving false evidence and to revoke the order of the Deputy Magistrate.

These cases came on for hearing before COLLINS, C.J., and BENSON, J., who made the following order of reference to the Full Bench :—

ORDER OF REFERENCE TO THE FULL BENCH.—The question for decision is whether the High Court, as a Court of Revision, has power to revoke an order made by a Subordinate Court under Section 476, Criminal Procedure Code.

This Court, following the case of *Queen-Empress* v. *Rachappa* (1), has decided that the High Court has no such power (*Queen-Empress* v. *Narakka* (2)), but the Calcutta and Allahabad High Courts have held the contrary. See *In the matter of the petition of Khepu Nath Sikdar* v. *Grish Chunder Mukerji* (3); and *In the matter of the petition of Mathara Das* (4).

[125] As we have some doubt as to the correctness of the decision in *Queen-Empress* v. *Narakka* (2), and as the question is one of considerable general importance, we think it desirable to refer it for the decision of the Full Bench.

[The matter subsequently came on for hearing before the Full Bench constituted as above.]

Mr. *R. A. Nelson*, for petitioners.

The Public Prosecutor (Mr. *E. B. Powell*), for the Crown.

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* Criminal Revision Cases Nos. 428 and 429 of 1897.

(1) 13 B. 109. (2) 13 M. 144. (3) 16 C. 730. (4) 16 A. 80.

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Mr. *R. A. Nelson.*—The cases of *Queen-Empress* v. *Rachappa* (1) and *Queen-Empress* v. *Narakka* (2) are only apparently adverse to the view that the High Court has such power. The question of the powers of such Court on revision never arose in the former case, the question at issue being the powers of a District Court on appeal under Section 195. The latter case decided that a High Court on appeal under that section had no such power, but a power to interfere on revision was assumed (*In the matter of the petition of Mathura Das* (3).) He relied further on *In the matter of the petition of Khepu Nath Sikdar* v. *Grish Chunder Mukerji* (4), *Abdul Khadar* v. *Meera Saheb* (5), and *In re Devji valid Bhavani* (6).

Mr. *E. B. Powell.*—The proceedings of a Court under Section 476, Code of Criminal Procedure, amount to a "complaint" under Section 195 (*b*). See *Ishri Prasad* v. *Sham Lal* (7). Whilst Section 195 provides for appeals in the case of a "sanction" being given by a Court, no right of appeal is given in the case of a "complaint" of a Court. Section 439, which states the scope of a High Court's powers on revision, confers upon it, *inter alia*, "the powers conferred on a Court of Appeal by Section 195." Therefore a High Court on revision has no power to interfere with a prosecution instituted on the complaint of a subordinate Court. He referred to *Queen-Empress* v. *Rachappa* (1).

## JUDGMENT.

COLLINS, C. J.—The question whether the High Court, as a Court of Revision, has power to revoke an order made by a Subordinate Court under Section 476, Criminal Procedure Code, is the subject of this reference to the Full Bench.

**[126]** I am of opinion that the High Court, in revision, has the power. By Section 476, a Civil, Criminal or Revenue Court may, if such Court is of opinion that there is ground for enquiring into any offence referred to in Section 195 and committed before it or brought under its notice in the course of a judicial proceeding, after making any preliminary enquiry that may be necessary, send the case for enquiry or trial to the nearest Magistrate of the first class. It is impossible to hold, as argued by the Public Prosecutor, that this proceeding is a mere complaint of a public servant. It is an order by a Court.

By Section 439 the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Sections 195, 423, &c. Now, Section 423, Clause (*c*), gives the High Court power "in an appeal from any other order" (other than those orders previously mentioned) "to alter or reverse such order." An order under Section 476 is not excluded, and therefore, in my opinion, is included in Clause (*c*).

The case of *Queen-Empress* v. *Narakka* (1) is not in conflict with either *In the matter of the petition of Khepu Nath Sikdar* v. *Grish Chunder Mukerji* (4), or *In the matter of the petition of Mathura Das*(3). The Judges in *Queen-Empress* v. *Narakka*(2) held that there was no appeal against an order made under Section 476, but, as pointed out by Aikman, J., in *In the matter of the petition of Mathura Das* (3), they appeared to be of opinion that they had power to interfere in revision.

It is stated that in *Queen-Empress* v. *Rachappa* (1), the learned Judges who decided that case came to the conclusion that the High Court

(1) 13 B. 109. (2) 13 M. 144. (3) 16 A. 80. (4) 16 C. 730.
(5) 15 M. 225. (6) 18 B. 581. (7) 7 A. 871.

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had no power to revise an order under Section 476. I am, however, compelled, with great respect, to differ from the Bombay Courts on this point.

SHEPHARD, J.—Mr. *Nelson* has justly pointed out that there is in point of fact no conflict between the case reported in *Queen-Empress* v. *Naraka*(1), and the Calcutta and Allhabad cases mentioned in the order of reference, and that, as far as this Court is concerned, there is no reported case in which the power of the High Court to review the action taken by a Subordinate Court under Section 476 of the Criminal Procedure Code has been [127] denied. On the contrary the language used in the judgment in *Queen-Empress* v. *Narakka* (1), is clearly indicative of the view that the power is possessed by the High Court, and it is with reference to another point that *Queen-Empress* v. *Rachappa* (2) was decided.

It is true that in Section 195 the distinction between a sanction to prosecute and a complaint is explained by the provision for appeal contained in the antepenultimate paragraph. I was at first inclined to accede to the argument of the Public Prosecutor, founded on the provisions of Section 195; but on consideration I think that the sanction, which a public servant may give, or the complaint which he may lodge for the purpose of Section 195, are so entirely different from the action which a Court may take under Section 476 as to obviate the suggested difficulty of holding that the action of the Subordinate Court may be subject of revision, but not so the complaint of the public servant. Under Section 476, the Court before which an offence has been committed has first to hold such preliminary inquiry, as may be necessary, then to send the case for inquiry to a Magistrate and to send the accused in custody or take security for his appearance, and finally, if it thinks fit, to bind over the witnesses to give evidence. These are all steps which only a Court or a Magistrate could take. They differ in kind from the complaint which a public servant may lodge. The words used in Section 439 giving the High Court powers of revision are general. The section does not refer to Section 476 and does not contain any words indicating an intention to exclude from the operation of the section proceedings taken under Section 476. I concur in the view expressed by Aikman, J., in *In the matter of the petition Mathura Das* (3) and answer the question referred in the affirmative.

SUBRAMANIA AYYAR, J.—I am of the same opinion, though at first I was inclined to take a different view. No doubt Section 195 draws a distinction between sanction given by a public servant and a complaint by him. But it is difficult to support the suggestion that Section 476 only lays down provisions as to how a Court empowered to act under it is to make a complaint. I think there can be no doubt that what is done under the latter section constitutes a "proceeding, which is open to revision under Section 439 [128] since there is nothing in the Code expressly prohibiting such revision. I, therefore, concur in answering the question in the affirmative.

BODDAM, J.—I agree with the judgment of SHEPHARD, J.

[These cases coming on for final hearing after the above decision of the Full Bench, the Court delivered the following

## JUDGMENT.

The Full Bench has decided that we have the power to interfere to prevent a prosecution ordered under Section 476, Criminal Procedure Code, from being proceeded with. On the merits, however, we find no case whatever for interference. We dismiss both the petitions].

(1) 13 M. 144. (2) 13 B. 109. (3) 16 A. 80.

21 M. 128 (F.B.) = 8 M.L.J. 69.

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21 M. 128
(F.B.) =
8 M.L.J. 69.

## APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Shephard, Mr. Justice Subramania Ayyar, Mr. Justice Davis and Mr. Justice Boddam.*

MARUDAMUTHU NADAN AND OTHERS (*Plaintiffs*), *Appellant v.* SRINIVASA PILLAI AND OTHERS (*Defendants*), *Respondents.** [2nd April, 5th November, and 14th December, 1897 and 31st January, 1898.]

*Hindu Law—Transfer by Hindu widow of part of her estate—Consent of reversioner.*

A Hindu widow with the consent of A, the then nearest reversioner, sold part of the property inherited by her from her husband. A predeceased the widow and on her death B, C and D were the nearest reversioners, and they now sued to recover the property. It appeared that the sale was not justified by circumstances of legal necessity and that D had been born after the sale had taken place:

*Held*, that the sale was not binding on the plaintiffs or any of them.

[**Overr.**, 16 Ind. Cas. 710 (713) = 23 M.L.J. 363 (367) = 12 M.L T. 325 = (1912) M.W.N. 1223 : **Diss.**, 35 C 939 = 8 C.L.J. 280 = 12 C.W.N. 837 ; 15 Ind. Cas. 637 (638); **F.**, 13 M.L.T. 443 = (1913) M.W.N. 448 ; **R.**, 30 A. 1 = 5 A.L.J. 1 = 9 Bom. L.R. 1318 = 6 C.L.J. 766 = 12 C.W.N. 74 = 35 I. A. 1 = 17 M.L.J. 605 = 3 M.L.T. 1 = 11, O. C. 78 ; = 26 M. 143 (154) = 12 M.L.J. 197 (206) : 31 M. 366 (F.B.) = 18 M.L J. 309 = 3 M.L.T. 355 ; 32 M. 206 = 19 M.L.J. 88 = 5 M.L.T. 122 ; 17 C.L.J. 499 (515) = 17 C.W.N. 701 ; 8 B.C. 21 (28) ; 17 P.R. 1902 = 16 P.L.R 1902 ; 151 P.L. R. 1910.]

SECOND appeal against the decree of T. M. Horsfall, District Judge of Tanjore, in appeal suit No. 537 of 1894, confirming the decree of S. Dorasami Ayyar, District Munsif of Tanjore, in original suit No. 680 of 1892.

The facts of the case are stated above sufficiently for the purpose of this report.

The plaintiffs preferred this second appeal.

[129] This second appeal first came on for hearing before SUBRAMANIA AYYAR and BENSON, JJ., who made the following order of reference to the Full Bench :—

ORDER OF REFERENCE TO THE FULL BENCH.—A Hindu widow, having sold a portion of the property inherited by her from her husband, the plaintiffs, as reversioners, impeach the sale and sue to recover possession of the property. The finding of both the Courts is that the sale was not made for a necessity rendering it binding upon the reversioners as a sale. It is, however, contended before us that the consent of the then nearest reversioner, Kolandavelu Nadan, renders the sale binding upon the present plaintiffs, who were the reversioners entitled to the estate at the time the succession opened. The first and second plaintiffs but not the third plaintiff were, it is to be observed, in existence at the time of the sale.

The authorities bearing upon the question involved in the plaintiffs' (appellants') contention are not easily reconcilable, and the question itself is of considerable general importance.

We resolve, therefore, to refer for the decision of a Full Bench the following question, *viz.* :—

Whether the assent of the said Kolandavelu Nadan renders the sale binding upon all or any, and, if so, which of the plaintiffs?

* Second Appeal No. 287 of 1896.

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21 M. 128 (F.B.) = 8 M.L.J. 69.

[The matter came on for hearing before the Full Bench as constituted above.]

*Sivasami Ayyar*, for appellants.

*Pattabhirama Ayyar*, for respondents Nos. 1 and 2.

*Sivasami Ayyar.*—At the time of the sale there were alive besides the consenting reversioner, plaintiff No. 1, the father of the plaintiffs Nos. 2 and 3 and plaintiff No. 2: plaintiff No. 3 was born since. Under these circumstances the consenting reversioner could not by his consent render the sale valid against the plaintiffs. The authorities are summed up in Maynes' Hindu Law,' paragraph 592. It requires the consent of all those likely to be affected by the alienation to render it valid. *Ramphal Rai* v. *Tula Kuari* (1) followed in *Madan Mohan* v. *Puran Mal* (2). [SUBRAMANIA AYYAR, J.—The Allahabad Court holds that the widow cannot accelerate the succession but that it is not clear. SHEPHARD, J.—Does not the Privy Council in *Behari Lal* v. *Madho Lal Ahir Gayawal*(3) differ from the Allahabad view?] That case does not conclude [130] the present. The phrase "may be accepted" at page 241 means assuming that for the purpose of the present case. But taking it that the Privy Council holds that it is open to a widow to accelerate the succession she can surrender her estate to the next reversioner in its entirety: she cannot, however, reserve any part of it to herself either as to the time or quantity. The matter is discussed by Garth, C. J., in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (4) where the distinction between a relinquishment whereby the next heir is let in and an alienation by the widow is explained. There can be no partial relinquishment if the transaction is to pass the estate like the widow's death (*Radha Shyam Sircar* v. *Joy Ram Senapati* (5). [SHEPHARD, J.—There the four reversioners were of the same grade which distinguishes that case from the present.] The case supports my proposition that the relinquishment to have the effect contended for must be complete. [SUBRAMANIA AYYAR, J.—There are Calcutta decisions upholding alienation of part of the estate.] Yes, for instance, *Hem Chunder Sanyal* v. *Sarnamoyi Debi* (6). The judgment is summed up at page 361; the second proposition there stated, which the Judges say is in accord with the decided cases (they do not say in accord with Hindu Law), is I submit wrong, it goes beyond the ruling of the Privy Council in *Rani Anand Kunwar* v. *The Court of Wards* (7),; see also *Kolandaya Sholagan* v. *Vedamuthu Sholagan* (8). The fact that, under certain circumstances, a reversioner not being the nearest reversioner can sue supports my argument if the widow could alienate validly with the consent of the nearest reversioner the remoter reversioners would in no case be permitted to intervene.

The ruling in *Behari Lal* v. *Madho Lal Ahir Gayawal* (3) must be applied only subject to the reasons for the decision and not in aid of fraud and the fiction of acceleration of the succession as on the widow's death must not be extended to the case of partial alienation.

*Pattabhirama Ayyar.*—The principle laid down in Collector of *Masulipatam* v. *Cavaly Vencata Narrainapah* (9) governs the case; the consent not only raises the presumption of necessity and evidences it, but it does more, it gives validity to the alienation.

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(1) 6 A. 116. (2) 6 A. 288. (3) 19 C. 236.
(4) 10 C. 1102. (5) 17 C. 896. (6) 22 C. 354.
(7) 6 C. 764.. (8) 19 M. 337. (9) 8 M.I.A. 529 (550).

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[131] See also *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (1). The case of *Rani Anand Kunwar* v. *The Court of Wards* (2) is not inconsistent with this view, for there it was an adoption which was in question and the case is distinguishable on that ground (*Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (1)). As to the person interested there is none except the nearest reversioner. [SUBRAMANIA AYYAR, J.—Would the consent of the nearest reversioner bar all the others?] Yes under the circumstances of the present case, but the consent of one reversioner would not bar others of the same grade. The circumstance that the alienation here did not comprise the whole of the property does not render it inoperative. The whole of the widow's interest in the property in question is dealt with and that suffices. See *Varadayya* v. *Venkatasubbayya* (3) and *Raghava Mudaliar* v. *Narayanasami Mudaliar* (4) as to the supposed doctrine that while an entire renunciation by a widow is valid and a partial renunciation is invalid, the case might be put of a transaction by which the parties thought they were dealing with all the properties and there ultimately proves to have been more, can it be that the whole transaction would fail? Again, how if she conveys the whole in several parts to several people? [SUBRAMANIA AYYAR, J.—The Court would consider whether there was in substance a complete renunciation.] See *Noferdoss Roy* v. *Modhu Soondari Burmonia* (5) and *Cossinaut Bysack* v. *Hurroosoondry Dossee* (6). He also cited *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (7), *Narasimha* v. *Venkatadri* (8), and *Varjivan Rangji* v. *Ghelji Gokaldas* (9).

## JUDGMENT.

SHEPHARD, J.—In considering the question referred by the Division Bench, I think we may safely start from the position assumed by the Judicial Committee in *Behari Lal* v. *Madho Lal Ahir Gayaval* (10), namely, "that, according to Hindu law, the widow can accelerate the "estate of the heir by conveying absolutely and destroying her life-"estate." Whether the power thus conceded to the widow in Bengal should be allowed to her in this Presidency, where there is no such current of decisions as there [132] is in the other Presidency, is a matter which it is not necessary to consider. The observation of the Judicial Committee is a strong authority for the proposition that if the next reversioner's consent by itself is to validate the widow's conveyance, that conveyance, must be absolute having the effect of destroying the widow's estate altogether. In the case cited the grantee was at the date of the grant the apparent reversionary heir entitled to take on the death of the grantor, and the conveyance, though it seems to have comprised all the property, fell far short of amounting to an absolute surrender of her estate. It was argued that the case of alienations to strangers stood on a different footing and that the consent of the apparent reversionary heir could take the part of legal necessity for the alienation so as to make it binding on the eventual heirs. I do not think the dicta cited support this contention (*Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (11), *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (1). The

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(1) 13 M.I.A. 209 (228). (2) 6 C. 764 (772.)
(3) Appeal No. 158 of 1890 (unreported).
(4) Second Appeal No. 1022 of 1892 (unreported). (See 4 M.L.J. 88.)
(5) 5 C. 732 (735). (6) 2 Morley's Digest 198, at p. 216.
(7) 12 M.I.A, 397 (442). (8) 8 M. 290. (9) 5 B. 563.
(10) 19 C. 236 (241). (11) 8 M.I.A. 529 (551).

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consent of the reversionary heir may afford evidence of a legal necessity justifying the widow's alienation, but apart from that its efficacy is no other than that recognized in *Behari Lal* v. *Madho Lal Ahir Gayawal*(1). It was further contended that the rule laid down by the Judicial Committee would be satisfied, if the widow surrendered absolutely her entire interest in a particular part of the inheritance and that an alienation of that part might therefore be valid, notwithstanding that other property being part of the inheritance remained in her hands. The reasons for the rule show that this cannot have been the meaning of the Judicial Committee. The condition that the widow must surrender the whole inheritance, if she desires to make a valid conveyance, must infallibly operate as a check on the frequency of such conveyances, whereas it would practically be no check at all to require her to divest herself completely of her interest in some part only of the inheritance.

I think we may fairly assume that the Judicial Committee, when making the observation cited, had before them the judgment of the Full Bench in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*(2); and that, as I gather from the report, was a case in which the whole inheritance had been alienated by the widow (see particularly *per* Garth, C.J., page 1108 and *per* Mitter, J., page 1110).

[133] I am of opinion that the question referred to us should be answered in the appellants' favour.

SUBRAMANIA AYYAR, J.—I am of the same opinion. I think it unnecessary to go into the question, whether the Hindu law according to the texts or the commentaries lends support to the doctrine that a female holding a qualified estate can validly surrender such an estate, so as to entitle the then immediate reversioner to enter upon the inheritance and to hold it absolutely as if the succession had opened by the natural or civil death of the qualified owner. Though there has been no course of decisions on the point in this Presidency as in Bengal, yet instances have occurred which show that parties have acted upon the view that such surrenders are valid in these parts as well. This appears even from some of the cases which have come before the Courts. Since there is nothing in the doctrine itself which makes it less suited to the community in this Presidency than to the community in Bengal, it is not surprising that the Calcutta rulings have in practice been followed in this Presidency also. In such circumstances the rule, as stated by the Judicial Committee in *Behari Lal* v. *Madho Lal Ahir Gayawal* (1), should, I think, be taken to be a rule applicable to this Presidency too, subject no doubt to the restriction pointed out by their Lordships, *viz.*, that the surrender should be absolute and complete and that the whole limited estate should be withdrawn—a restriction that would guard against the injurious results which would follow if the rule were not so qualified. As, however, in the present instance the alienation by the widow was of but a part of the estate, the case must be held not to fall within the rule stated above.

The answer to the question referred, in my opinion, therefore, is that the assent of Kolandavelu Nadan does not render the sale binding upon any of the plaintiffs.

DAVIES, J.—I concur in the judgment of Shephard, J.

BODDAM, J.—I agree.

[This second appeal came on for final hearing, and the Court delivered the following judgment:—

(1) 19 C. 236 (241.) (2) 10 C. 1102.

JUDGMENT (FINAL.)

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FULL BENCH.

21 M. 128 (F.B.)= 8 M.L.J. 69.

In accordance with the judgment of the Full Bench we must hold that the alienation is not binding on the plaintiffs.

[134] In the result, we set aside the decrees of the Courts below and give judgment for plaintiffs for possession of the land sued for on their paying Rs. 230 within three months from this date, failing which the suit will stand dismissed with costs throughout. If the payment is duly made each party will bear their own costs throughout.]

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**21 M. 134=7 M.L.J. 196.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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PICHUVAYYAN (*Plaintiff*), *Appellant v.* VILAKKUDAYAN ASARI, (*Defendant No.* 2), *Respondent.** [5th, and 6th April, 1897.]

*Regulation* VI *of* 1831 (*Madras*), *Section* 3—*Village service inam—Village blacksmith —Limitation.*

The mortgagee of maniam land attached to the hereditary office of village blacksmith sued in the Court of a District Munsif for possession, to which he claimed to be entitled under his mortgage; and there was evidence that he had been in possession for many years up to a date not long prior to the suit:

*Held*, that, as the plaintiff could have sued only under Regulation VI of 1831 in a Revenue Court, he could not, under Limitation Act, 1877, Section 28, acquire a title by prescription to the land.

[F., 9 Ind. Cas. 796=9 M.L.T. 430=(1911) M.W.N. 208; R., 33 M. 488 (491)=5 Ind. Cas. 477=7 M.L.T. 198]

SECOND appeal against the decree of W. Dumergue, District Judge of Madura, in appeal suit No. 170 of 1895, reversing the decree of S. Ramasami Ayyangar, District Munsif of Sivaganga, in original suit No. 481 of 1894.

The plaintiff, alleging that he was the possessory mortgagee, sued to eject the defendants from the land alleged to be comprised in his mortgage. He obtained a decree in the Court of First Instance and the second defendant appealed to the District Court.

The District Judge said:—"The plaint land is admittedly maniam land attached to the hereditary office of village blacksmith and is in the possession of the second defendant who is the holder of the office. The District Munsif has held, *inter alia*, that the mortgage is valid and that the second defendant is estopped from questioning its validity, but he has entirely over-[135] looked the provisions of Regulation VI of 1831. One of the objects of that Regulation, as stated in the preamble, was to declare that all emoluments attached to various hereditary village and other offices (other than the office of Kurnam established by Regulation XXIX of 1802) in the Revenue and Police departments 'are inalienable by mortgage, sale, gifts or otherwise' and Civil Courts are precluded by Section 3 from taking cognizance of any claims to the enjoyment of any of the emoluments annexed to such offices. In *Ravutha Koundan* v. *Muthu Koundan* (1), the question to be decided was whether a certain land alleged to be 'maniam' was or was not 'maniam' and this question was

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* Second Appeal No. 290 of 1896.

(1) 13 M. 41.

1897 APRIL 6. — APPELLATE CIVIL. — 21 M. 134 = 7 M.L.J. 196.

held to be within the jurisdiction of a civil tribunal, but in *Palamalai Padayachi* v. *Shanmuga Asari* (1) the Full Bench decided that a suit for the possession of the emoluments of an hereditary office is not maintainable in a Civil Court. No doubt in that case the plaintiff claimed also a right to the office, but, considering the terms of the preamble and of Section 3, Regulation VI of 1831, the same rule is, in my opinion, applicable to this case also, where the plaintiff seeks to obtain possession of the maniam lands and to eject the office holder. Hence the decree of the Lower Court must be reversed and the plaintiff's suit dismissed with costs throughout."

The plaintiff preferred this second appeal.

*Kuppusami Ayyar*, for appellant.

*Desikacharyar*, for respondent.

JUDGMENT.

Blacksmith and carpenter inams are within the purview of Regulation VI of 1831 (letter from the Sadr Adalat to Government, dated 30th June 1852, and *Palamalai Padayachi* v. *Shanmuga Asari* (1). The plaintiff did not allege in his plaint a title by adverse possession for over twelve years, nor was there any issue on such plea. Moreover as the plaintiff could have sued only under Regulation VI of 1831 in a Revenue Court but not in a Civil Court for recovery of the inam land and as the Indian Limitation Act does not prescribe any period of limit for suits under the Regulation, the plaintiff could not under Section 28 of the Act acquire a title by prescription.

The second appeal, therefore, fails and is dismissed with costs.

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**21 M. 136.**

[136] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

FISCHER (*Defendant No.* 2), *Appellant v.* KAMAKSHI PILLAI, (*Plaintiff*), *Respondent*.* [2nd August, 1897.]

*Rent Recovery Act (Madras)—Act* VIII *of* 1865, *Section* 11—*Enhancement of rent—Custom.*

The imposition by a zamindar of garden assessment on land brought under garden cultivation by a tenant who improved the land by sinking a well after 1865 is illegal, although there might be a custom in the zamindari of charging a varying assessment according to the kind of crop raised.

[**F.**, 28 M. 444=15 M.L.J. 292; 31 M. 17=17 M.L.J. 513=3 M.L.T.101; **Appr.**, 28 M. 328=15 M.L.J. 14; **R.**, 36 M. 4 (6)=10 Ind. Cas. 68 (69)=9 M.L.T. 443 =(1911) 1 M.W.N. 315 (316); 4 Ind. Cas. 98=6 M.L.T. 310; 5 Ind. Cas. 911 =20 M.L.J. 142=8 M.L.T. 115; **D.**, 30 M. 510=17 M.L.J. 518=2 M.L.T. 455; 31 M. 19=17 M.L.J. 511=3 M.L.T. 103; 14 Ind. Cas. 563 (566)=23 M.L.J. 59.]

SECOND appeal against the decree of W. Dumergue, District Judge of Madura, in appeal suit No. 257 of 1895, affirming the decree of K. Krishnama Chariar, District Munsif of Madura in original suit No. 539 of 1894.

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* Second Appeals Nos. 1026 to 1032 of 1896.

(1) 17 M. 302.

1897 Aug. 2. — Appellate Civil. — 21 M. 136.

The plaintiff was a tenant in the Bodinaikanur zamindari; the first defendant was the zemindarni, and the second defendant was the mortgagee in possession of the zamindari. The plaintiff sued to compel the defendants to grant him a proper patta.

The facts of the case were stated by the District Judge as follows :—

The plaintiff held lands classed as faisal punja in the zamindari. He cultivated them with punja crops and paid the faisal punja teervah on them until the end of fasli 1300. In fasli 1301, he made a well, at his own expense, and since then cultivated garden crops. Thereupon, the second defendant tendered him a patta for fasli, 1302, charging a higher rate of rent in place of the faisal punja teervah rate. He refused to accept this patta and maintained that the defendants were not entitled to collect more than the faisal rate. The defendants on the other hand contended that according to a custom which prevailed in the zamindari even before the settlement, the tenants are bound to pay according to the "*thavanai*" of the crops, in other words, that the rent varies with the crop. They admitted that the land had become fit for garden cultivation only by reason of the improvements effected by the plaintiff. The District Munsif held that evidence of the **[137]** custom was inadmissible and that the defendants were not entitled to levy anything beyond the faisal rate, and accordingly passed a decree for the plaintiff. On appeal the District Judge found that the rate claimed for garden crops was a customary rate in the zamindari, but that the faisal accounts of the zamindari were not shown to recognize rates of rent varying with crop, and he dismissed the appeal.

Defendant No. 2 preferred this second appeal.

*Tirumalasami Chetti*, for appellant.

Respondent was not represented.

## JUDGMENT.

It is admitted that the garden crop in this case is the result of an improvement effected by the tenant in sinking a well. According to the law (Section 11, Madras Act VIII of 1865) the landlord is precluded from enhancing the rent on account of improvements made by the tenant (per Muttusami Ayyar, J.—*Venkatagiri Raja* v. *Pitchana* (1) ). The imposition of garden assessment is clearly an enhancement of the rent. It was, however, contended that the zamindar was, in accordance with the custom of the zamindari, entitled to the assessment claimed.

The custom relied upon appears to have been an alleged custom of charging a varying assessment according to the kind of crop raised; such a custom would, if established, be valid, but it could not derogate from the rights secured to tenants by Section 11 of the Act of 1865. The custom could only be upheld in so far as it might not conflict with the Statute law. In other words, the landlord would be entitled to vary the rates according to the cultivation only in cases where the variation in the crop was not the result of improvements made by the tenant.

Our attention has been drawn to *Fischer* v. *Narayanan* (2). In that case, however, there is nothing to show that the well had been constructed after Act VIII of 1865 came into force. Prior to that Act zamindars sometimes collected an enhanced rent on garden crop raised with the aid

(1) 9 M. 27. (2) Civil Revision Petition No. 195 of 1895 (unreported.)

1897 AUG. 2. — APPELLATE CIVIL. — 21 M. 136.

of wells constructed by the tenants, and a usage under which a zamindar made such collection might not be unreasonable. But such a usage cannot affect the present case where the improvement was effected in 1891.

In this view the second appeal fails and is dismissed.

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21 M. 138.

## [138] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

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ERESSA MENON (*Defendant No.* 12), *Appellant v.* SHAMU PATTER AND ANOTHER (*Plaintiff and Defendant No.* 1), *Respondent** [19th August, 1897.]

***Malabar tenants' right to compensation for improvements—Compensation for improvements and arrears of rent set off.***

As regards the right to the value of improvements, there is no distinction between a tenant under a kanom and under a verumpattom.

The right of the landlord to set off against the value of the improvements any rent due to him must prevail against any alienation made by the tenant of his right to compensation.

[R., 25 M. 568 (571).]

SECOND appeal against the decree of A. Venkataramana Poi, Subordinate Judge of South Malabar, in appeal suit No. 325 of 1885, affirming the decree of P. Raman, Acting Additional District Munsif of Calicut, in original suit No. 645 of 1894.

The plaintiff sued to recover possession, together with arrears of rent, of certain land demised by him to defendant No. 1. The plaintiff admitted that certain improvements had been made by the defendant and offered to deduct their value from the arrears of rent. Defendants Nos. 2 to 9 were joined as being members of first defendant's tarwad. Defendants Nos. 12 and 14 were mortgagees from defendant No. 1, and they denied the plaintiff's right to credit the value of improvements against arrears of rent and claimed priority over the plaintiff's claim for rent. The District Munsif overruled the contentions of defendants Nos. 12 and 14 and, having assessed the value of improvements for which the plaintiff was charged for with compensation, passed a decree for surrender of the land. This decree was affirmed on appeal by the Subordinate Judge.

Defendant No. 12 preferred this second appeal.

*Govinda Menon*, for appellant.

*Ryru Nambiar*, for respondent No. 1.

## JUDGMENT.

So far as the right to the value of improvements goes, there is no distinction between a tenant under "kanom" and [139] under "verumpattom." As pointed out in *Achuta* v. *Kali* (1), the right to receive such compensation becomes perfected only at the time of eviction, and subject to the customary incidents attending to the tenure. Consequently the right of the landlord to set off against the value of the improvements any rent due to him under the lease must prevail against any alienation made by the tenant of his right to compensation when it is in an inchoate state.

The second appeal therefore fails, and it is dismissed with costs.

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* Second Appeal No. 1530 of 1896.

(1) 7 M. 545.

21 M. 139 = 7 M.L.J. 315.

1897 AUG. 23.

APPELLATE CIVIL.

21 M. 139 = 7 M.L.J. 315.

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

PERIANNA GOUNDAN (*Plaintiff*), *Appellant* v. MUTHUVIRA GOUNDAN AND ANOTHER (*Defendants*), *Respondents*.*
[23rd August, 1897.]

*Limitation Act—Act XV of* 1877, *Schedule* II, *Article* 132—*Suit on a hypothecation bond, dated* 1876, *to secure money payable on demand.*

In a suit to recover principal and interest due on a hypothecation bond executed before the Transfer of Property Act was passed to secure a loan payable on demand, it appeared that the plaint was filed more than twelve years after the date of the document sued on :

*Held*, that the suit was governed by Limitation Act, Schedule II, Article 132, and that an actual demand was not necessary to establish a starting point for limitation and that the suit was barred by limitation.

SECOND appeal against the decree of D. Broadfoot, Acting District Judge of Trichinopoly, in appeal suit No. 4 of 1895, affirming the decree of G. Narasimhalu Naidu, District Munsif of Kulitalai, in original suit No. 513 of 1893.

Suit to recover principal and interest due on a hypothecation bond, dated 15th August 1876, and executed by defendant No. 1 in favour of the predecessor-in-title of the plaintiff to secure together with interest Rs. 80 payable on demand. The District Munsif held that the suit was barred by limitation and passed a decree for the defendants, which was affirmed on appeal by the District Judge.

[140] The plaintiff preferred this second appeal.

*Sundara Ayyar*, for appellant.

*Krishnamachariar*, for respondent.

## JUDGMENT.

There can be no doubt but that, under the general law, money lent, payable on demand, is due from the date of the loan ; in other words, there is a cause of action on the date of the loan.

This being so, we must hold that, in a suit brought to enforce payment of money so lent, the money must be taken to have become due, within the meaning of the column 3 of Article 132 of Schedule II of the Limitation Act, on the date of the loan. To hold otherwise would lead to an anomaly for which there is no justification. If it was intended that money lent on the security of immoveable property, though payable on demand, should not be subject to the general rule as to money lent and payable on demand (Article 59), the language of the third column of Article 132, would have been so framed as to make this clear.

We cannot therefore accept the appellant's contention that, in a case like the present, an actual demand is necessary in order to establish a starting point for limitation under Article 132.

According to the decisions of this Court, Article 132—not Article 147—is applicable to the present case, the instrument being admittedly one executed prior to the Transfer of Property Act. Whether it might be

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* Second Appeal No. 1525 of 1896.

1897 Aug. 23. — Appellate Civil. — 21 M. 139 = 7 M.L.J. 315.

different if the instrument had been executed after the Transfer of Property Act came into force, we need not now decide.

The appellant's suit was therefore barred and was rightly dismissed. We dismiss this second appeal with costs.

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21 M. 141 = 7 M.L.J. 275.

## [141] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

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NATESAN CHETTI AND OTHERS (*Defendants Nos. 2 to 4*), *Appellants* v. SOUNDARARAJA AYYANGAR AND ANOTHER (*Plaintiff No. 1 and Defendant No. 1*), *Respondents.**
[24th August and 2nd September, 1897.]

*Limitation Act—Act* XV *of* 1877, *Schedule* II, *Article* 111—*Enforcement of vendor's lien.*

In 1887 the plaintiff sold land to defendant No. 1 who in 1894, while part of the purchase money remained unpaid, sold it to the defendants Nos. 2 to 4, who had notice of this fact. The plaintiff now in 1895 sued to enforce his vendor's lien :

*Held*, that the suit was barred by Limitation Act 1877, Schedule II, Article 111.

[**Overr.**, 29 M. 305 ; **Diss.**, 21 A. 454, 9 O.C. 284 : **F.**, 24 M. 233 = 10 M.L.J. 349 ; **R.**, 4 N.L.R. 49 (54) ; 4 N.L.R. 90 (93) ; **D.**, 26 M. 696 (714) (**F.B.**)]

SECOND appeal against the decree of T. M. Horsfall, District Judge of Tanjore, in appeal suit No. 499 of 1895, reversing the decree of N. Sambasiva Ayyar, District Munsif of Tiruvadi, in original suit No. 82 of 1895.

In 1887 the plaintiff sold certain land to defendant No. 1, it being agreed that as part of the price defendant No. 1 should pay a sum named to a creditor of his vendor. In 1894, defendants Nos. 2 to 4 who had notice of this arrangement and of the fact that defendant No. 1 had not carried it out, purchased the land from him. The plaintiff now sued in 1895 to recover the amount remaining unpaid asserting a lien on the land. The District Munsif passed a personal decree against defendant No. 1 only. On appeal the District Judge following *Virchand Lalchand* v. *Kumaji* (1) held that the plaintiff's lien for unpaid purchase money was still enforceable under the twelve years' rule in Limitation Act, 1887, Schedule II, Article 132, and accordingly modified the decree of the District Munsif and passed a decree as prayed.

Defendants Nos. 2 to 4 preferred this second appeal.

*Pattabhirama Ayyar*, for appellants.

*Krishnasami Ayyar*, for respondent No. 1.

### JUDGMENT.

This is a suit to enforce the lien possessed by a vendor of immoveable property in respect of unpaid purchase **[142]** money. The Court of First Instance decided that the case fell within Article 111 of the Limitation Act. But the Lower Appellate Court, following *Virchand Lalchand* v. *Kumaji*(1), held that Article 132 applied.

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* Second Appeal No. 1333 of 1896.
(1) 18 B. 48.

1897 SEP. 2.

APPELLATE CIVIL.

21 M. 141 = 7 M.L.J. 275.

Now Article 111 refers solely and in unmistakable terms to suits such as the present, while Article 132 deals with suits for money charged upon immoveable property generally. In the case cited above, no reasons were stated as to why the learned Judges arrived at the conclusion that Article 111 was inapplicable to cases similar to this, and that conclusion is opposed to the well established canon of interpretation that, as a rule, general provisions do not derogate from special provisions, but that the latter do derogate from the former. *Generalia specialibus non derogant, specialia derogant generalibus.* It is scarcely necessary to observe that, if Article 111 does not apply to such suits as the present, it is impossible to see to what suits it would apply. With all deference therefore to the very learned Judges who decided the case which the Lower Appellate Court followed, we must hold that the class of suits to which the present belongs, falls under the special provision, *viz.*, Article 111, and that class is excluded from the comparatively general Article 132 applicable to cases of money charged on immoveable property not specially provided for in the Act.

In this view, the suit, having been brought after the expiry of 3 years from the date mentioned in column 3 of Article 111, was clearly barred. We therefore allow the appeal, reverse the decree of the Lower Appellate Court and restore that of the District Munsif. The respondents must pay the appellants' costs in this and in the Lower Appellate Court.

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**21 M. 143.**

## [143] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

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SYAMALARAYUDU (*Plaintiff*), *Appellant v.* SUBBARAYUDU AND ANOTHER (*Defendants*), *Respondents.** [7th September, 1897.]

*Mortgage—Discharge of encumbrance by intending purchaser—*' Bona fides.'

A having mortgaged land to B agreed to sell it to C and then to D, in whose favour he executed a conveyance bearing a date prior to the contract with C. C sued A and D to have the conveyance set aside and his contract specifically performed and a decree was passed in his favour. While the suit was pending, D paid off B and now sued A and C to recover the money paid by him:

*Held*, that the plaintiff occupied the position of the mortgagee whom he had paid off, and that the sum constituted a charge on the land.

[F., 31 M. 439 = 18 M.L.J. 306 = 3 M.L.T. 395; 9 Ind. Cas. 789 = 9 M.L.T. 358 = (1911) 1 M.W.N. 197 (198); R. 33 M. 15 (22) = 3 Ind. Cas. 110 = 19 M.L.J. 489 = 6 M.L.T. 162; 8 A.L.J. 663 = 10 Ind. Cas. 556 (557); D., 16 Ind. Cas. 877 (880).]

SECOND appeal against the decree of G. T. Mackenzie, District Judge of Godavari, in appeal suit No. 41 of 1896, confirming the decree of E. Subbarayudu, District Munsif of Narsapur, in original suit No. 9 of 1895.

Defendant No. 1 was the owner of certain land which was mortgaged for 1,084 rupees. In 1890, he agreed to sell the land to defendant No. 2 but instead of completing the contract, he conveyed the land to plaintiff antedating the conveyance so as to make it appear that the plaintiff's rights were prior to those of defendant No. 2. Defendant No. 2 then sued to obtain the cancellation of the plaintiff's conveyance and specific

* Second Appeal No. 1222 of 1896.

(1) 18 B. 48.

1897 Sep. 7. — Appellate Civil. — 21 M. 143.

performance of his contract with defendant No. 1. After the summons had been served, the plaintiff paid off the mortgagees, and the suit brought by defendant No. 2 having terminated in a decree as prayed therein, he now sued to recover the money so paid by him. The District Munsif passed a decree for the sum in question against defendant No. 1, but held that the plaintiff had no charge on the land in the hands of defendant No. 2. This decree was affirmed on appeal by the District Judge.

The plaintiff preferred this second appeal.

*Ramachandra Rau Sahib*, for appellant.

*Pattabhirama Ayyar*, for respondent No. 2.

## JUDGMENT.

There is no dispute that the plaintiff did pay off the mortgagees with a sum of Rs. 1,084. He would ordinarily be [144] entitled to step into their shoes and to claim payment of his mortgage money out of the property originally mortgaged now in the hands of the second defendant, whose liability to pay the mortgage amount was established in the very suit in which the sale to him was upheld. The ground given in the Courts below for refusing to allow plaintiff's payment to be a charge upon the property was that the payment was not *bona fide*, and that it was not *bona fide* because it was made during the pendency of the suit between plaintiff and second defendant about the sale. We fail to see in this circumstance anything to affect the validity of the payment which was no doubt made by the plaintiff for the purpose of strengthening his own claim. The plaintiff's illegal act in antedating his sale deed also for the purpose of supporting his title does not vitiate the payment subsequently made, and which in itself was legal. There was, therefore, no want of *bona fides*, and certainly no fraud. We must accordingly allow the second appeal and direct that a decree for sale of the property be drawn up in the ordinary form for the sum of Rs. 1,084 with interest thereon at the rate of 12 per cent. per annum on Rs. 660 from the 11th March 1891 and on Rs. 424 from the 3rd March 1891 up to the date of the plaint, with 6 per cent. per annum thereafter until date of realization. The date for payment is fixed for the 7th March 1898. The second defendant must pay the plaintiff's costs on the above amount throughout. In other respects the decree of the Munsif is confirmed.

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21 M. 144.

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.*

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ITTIRARICHAN UNNI AND ANOTHER (*Defendants Nos.* 1 *and* 2), *Appellants v.* KUNJUNNI (*Plaintiff*), *Respondent.**
[27th September and 15th October, 1897.]

*Malabar Law—Powers of stani—Lease by stani of forest land attached to the stanom.*

A stani in Malabar is not a tenant for life impeachable for waste. He is a person who represents the estate for the time being, and it is open to him to [145] make a lease of forest land for a term of years, and the mere fact that the alienation is intended to hold good after his lifetime will not invalidate it.

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* Second Appeal No. 426 of 1897.

SECOND appeal against the decree of H. H. O'Farrell, District Judge of South Malabar, in appeal suit No. 621 of 1895, reversing the decree of P. P. Raman Menon, District Munsif of Nedunganad, in original suit No. 287 of 1894.

The facts of the case appear sufficiently for the purpose of this report from the following extract from the judgment of the District Judge:—

"The plaintiff is the appellant. He sued for an injunction and damages in respect of a felling lease executed by the first defendant in favour of the second. In the suit, as framed in the Lower Court, the plaintiff alleged that the first defendant was a stani; that he (plaintiff) was the next reversioner and that the acts complained of amounted to waste. The District Munsif held that plaintiff was merely an anandravan of an ordinary tarwad, and that if plaintiff were a reversioner of a stanom, the lease objected to was one within the ordinary powers of a stani to grant. There is no dispute that plaintiff has the right to sue either as reversioner to a stani or as anandravan of a tarwad, and the question of his status is not, in my opinion, material. The sole question is whether the act complained of amounted to waste? The lease in question grants to the second defendant the right to fell timber, except teak and blackwood and trees below 6 inches in girth, in a tract of forest 5 miles by 1½ miles for a consideration of Rs. 100. On the face of it the lease is of a most improvident character and practically authorizes the entire destruction of the forest. A karnavan, by Malabar Law, cannot dispose of the corpus of the property by an absolute sale without the consent of the anandravans, and if the defendant be a stani, he has still less powers in this respect. He is in the position of a life-tenant and the powers of such have been well described by Sir G. Jessel M. R. in *Honywood* v. *Honywood* (1) cited and followed in *Dashwood* v. *Magniac*. (2)

The District Judge recorded a finding that the damage done was not less than Rs. 400 and added, "the plaintiff, however, who is merely a reversioner and not entitled to present possession, cannot have a decree for that amount. There is no Indian precedent, but the form of the corresponding decree in England may be gathered [146] from the concluding portion of the bill in *Hony* v. *Hony* (3) " and he passed a decree as follows:— "it is hereby ordered and decreed that defendants be and are restrained from cutting away timber from the plaint forest described in the schedule below, that defendants do pay into Court Rs. 400, the amount of damages and that Rs. 400 found due will be deposited in the name of the District Munsif of Nedunganad in trust in the suit in the Government Savings Bank and accumulated for the benefit of the person or persons who may be entitled thereto upon the death of defendant No. 1."

Defendants Nos. 1 and 2 preferred this second appeal.

*Govinda Menon*, for appellants.

*Ryru Nambiar*, for respondent.

## JUDGMENT.

This is an appeal by the stani and his lessee against a decree obtained by the plaintiff as successor to the stanom. The effect of the decree is to restrain both the defendants absolutely from cutting the timber in certain forests, and to make the defendants liable in damages to the extent of Rs. 400, a peculiar direction being made as to the manner

(1) L R. 18 Eq. 306. (2) [1891] 3 Ch. 306.
(3) 1 Sim & St. 568=24 R.R. 256.

1897 Oct. 15. — Appellate Civil. — 21 M. 144.

in which the money shall be treated. In the District Munsif's Court the plaintiff's suit had been dismissed on the ground that the lease was one which the stani was competent to give. This decree is reversed by the District Judge and the decree as abovementioned is framed on the strength of certain English cases cited by the Judge, in which the position of a tenant for life impeachable for waste was in question. There is, as has often been observed, great danger in applying English decisions on the law of real property to cases which arise in this country. To make the decision cited applicable, it must be assumed that the English law of waste has been adopted by the Courts of British India, that the defendant stani was a tenant for life, and further that he was a tenant for life, impeachable for waste. No one of those assumptions can safely be made.

The position and powers of a stani have been often discussed. He is not a mere tenant for life, and he is certainly not impeachable for waste in the sense in which that expression is used in the English books. If it were true that a stani was in that position it would follow that he could not even cut down trees which were fit to cut or in a state of decay, without accounting for the proceeds [147] which would be treated as capital (see cases cited in notes to *Garth* v. *Cotton* (1).)

The decision of the Judge, founded as it is on considerations wholly foreign to the case, cannot be regarded as satisfactory. In any view the injunction in the terms in which it is granted could not be maintained, because it goes to the length of preventing the stani from making any use whatever of the timber. As, however, the stani has died it is unnecessary to pursue the question further except so far as it affects the other defendant. He is viewed by the District Judge as a simple wrong-doer, and, if it were true that the stani was a tenant for life impeachable for waste, this view might be correct. But the stani has, in truth, much larger powers than are attributed to him by the Judge. He is the person who represents the estate for the time being and enjoys much the same position as was assigned to the holder of an impartible zamindari before the current of decisions was turned in 1887 (see *Mana Vikraman* v. *Sundaran Pattar* (2)). It is certainly open to a stani to make a lease of forest land for a term of years and the mere fact that the alienation is intended to hold good after his lifetime will not invalidate it. Similarly it is competent to a stani to cut down forest trees for his own purposes, though by the manner and extent of his operations he may render himself liable to an action at the suit of the probable successor. It depends upon the circumstances of the case whether an alienation made by a stani or other conduct on his part in the management of his estate is of a character to render him liable to an action. In the present case, in order to make the lessee liable in damages, it would at least have to be proved that the acts done by him, would, if done by the stani immediately, have rendered him liable as for destruction of the inheritance. By the mere cutting of trees that being the ordinary and indeed the only way of enjoying the estate no injury is done of which, as between the stani and his successor, the latter has any right to complain. Considering that, as regards the lessee's liability, the finding of the Judge is vitiated by the erroneous point of view which he adopted and taking into account the extent of the forest and the comparatively small amount of timber cut, we hold that, on the facts stated, the decree for damages against him is not justified. As it stands, the decree relating to the damages is

(1) 1 White & Tudor, 697.

(2) 4 M. 148.

moreover [148] unworkable. The District Judge, in adopting it from the prayer of a bill, has failed to notice that in order to make the decree complete directions would be required as to the persons to whom the interest on the sum invested or the sum itself should ultimately be paid.

We must set aside the decree against the surviving defendant and restore as regards him the decree of the District Munsif. The respondent must pay the second defendant's costs in this and in the Lower Appellate Court.

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**21 M. 148.**

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Davies.*

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RAMASAMI MUDALIAR (*Defendant*), *Appellant v.* RATHNA MUDALIAR (*Plaintiff*), *Respondent*.* [26th October, 1897.]

*Rent Recovery Act (Madras)—Act VIII of* 1865, *Section* 8—*Suit to enforce tender of patta—Suit brought after expiration of fasli.*

A tenant is not entitled to bring a suit under Rent Recovery Act, 1865, Section 8, to enforce the tender of a patta by his landlord after the expiration of the fasli to which the patta relates.

[Expl., 22 M. 318.]

SECOND appeal against the decree of S. Russell, District Judge of Chingleput, in appeal suit No. 241 of 1895, modifying the decision of M. Srinivasa Rau, Deputy Collector of Chingleput, in summary suit No. 5 of 1895.

The plaintiff was the tenant of the defendant, and he sued under Rent Recovery Act, 1865, Section 8, to enforce the tender by the defendant of a patta for fasli 1303. The plaintiff demanded a patta after the expiration of the fasli, *viz*., in August 1894, and instituted this suit in December of the same year. The defendant had tendered to the plaintiff, on the 29th of June 1894, a patta which he refused to accept, alleging that it was not a proper patta which he was bound to accept. The Deputy Collector found that the patta tendered was a proper patta, and accordingly [149] dismissed the suit. The District Judge was of opinion that the patta required a modification, and directed that a new patta be given modified accordingly.

The defendant preferred this second appeal.

*Pattabhirama Ayyar*, for appellant.

*Krishnasami Ayyangar*, for respondent.

## JUDGMENT.

We do not think that Exhibit III is evidence of an implied undertaking by the plaintiff that he accepted the rates and terms of the patta, Exhibit A.

But the second point urged that the suit was not brought within the fasli 1303 to which the patta relates is, we think, fatal to the suit. It has been held in *Venkatasami Naik* v. *Setupati Ambalam*(1) that a patta must be tendered by a landlord within the fasli for which rent is sought to be recovered, and we are of opinion that the same rule must apply to a tenant

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* Second Appeal No. 1538 of 1896.

(1) 7 M. H. C. R. 359.

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when he demands a patta from the landlord. This suit, being brought after the expiration of the fasli for which the patta was demanded, was therefore barred by time. On that ground only, we reverse the decree of the District Judge and restore that of the Deputy Collector. The plaintiff must pay the costs of the appellant in this and in the Lower Appellate Court.

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**21 M. 148.**

## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Boddam.*

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VIRU MAMMAD (*Defendant No.* 17), *Appellant v.* KRISHNAN AND OTHERS (*Plaintiff and Defendants Nos.* 6, 7. 9, 11 *and Representatives of Defendant No.* 15), *Respondents.**
[3rd November, 1897.]

*Malabar Compensation for Tenants' Improvements Act (Madras)—Act I of* 1887, *Sections* 4 *and* 7—*Improvements made before and after* 1st *January* 1886.

Malabar Compensation for Tenants' Improvements Act, 1897, Section 7, cannot be construed retrospectively so as to invalidate agreements made with respect to improvements prior to the passing of the Act. In computing, therefore, the value of improvements made by a tenant in Malabar, who was let [150] into possession under an agreement before the passing of the Act, it is necessary, to ascertain the value of improvements made by him before the 7th January 1887, calculated according to the scales specified in his contract, and also the value of improvements effected subsequently, calculated under the provisions of the Act.

[Expl., 32 M. 1=18 M.L.J. 98=3 M.L.T. 291 and 5 M.L.T. 277.]

SECOND appeal against the decree of the District Judge of South Malabar, in appeal suit No. 465 of 1893, modifying the decree of A. Venkataramana Poi, Subordinate Judge of South Malabar, in original suit No. 4 of 1892.

Suit to recover possession of land with arrears of rent. The plaintiff had demised the land in question to the predecessors in title of defendants Nos. 1 to 4 and 17 to 19. Defendants Nos. 5 to 15 were sub-kanomdars under them. The main question was as to the compensation for improvements to which the tenants were entitled. The Subordinate Judge passed a decree for the plaintiff, which was modified in appeal by the District Judge.

Defendant No. 17 preferred this second appeal.

*Sundara Ayyar*, for appellant.

*P. K. Subramania Ayyar*, for respondent No. 1.

*Bhaskara Menon*, for respondents Nos. 2 and 4.

## JUDGMENT.

With regard to the sixth defendant, the sub-kanom being prior to the 1st January 1886, the Act does not affect the validity of the contract thereby made. As between this defendant and the appellant the former can only be entitled to the compensation which the contract gives him.

As to the other defendants (now respondents) it is said that the bulk of the improvements must have been effected before the Act came into force, and that for the improvements effected before that date they are

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* Second Appeal No. 1527 of 1895.

only entitled to be paid according to the rates stipulated in the sub-kanoms. It appears to us that Section 7 of the Act cannot be construed retrospectively, so as to invalidate agreements made with respect to improvements prior to the passing of the Act. So far as the section relates to making improvements, it must refer to improvements to be made subsequently, and, this being so, it is difficult to construe the rest of the section as referring to improvements effected prior to the date of the Act. Section 4 does not refer to contracts.

1897 Nov. 3. — APPELLATE CIVIL. — 21 M. 149.

It is necessary, therefore, to ascertain the value of the improvements made by each of the sub-demisees before the 7th January 1887, calculated according to the scales specified in the respective [151] contracts, and also the value of the improvements effected subsequently, calculated under the provisions of the Act.

We must direct the District Judge to return findings on these questions. Fresh evidence may be taken.

The findings should be submitted within one month from the date of the receipt of this order, and seven days will be allowed for filing objections after the findings have been posted up in this Court.

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**21 M. 151.**

## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.*

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REGO (*Plaintiff*), *Appellant v.* ABBU BEARI (*Defendant*), *Respondent.**
[23rd November, 1897.]

***Limitation Act—Act XV of* 1877, *Schedule* II, *Article* 134—*Sale by mortgagee as owner.***

A mortgaged land to B and then sold it to C, and subsequently sold it to B ignoring the previous sale. C now brought a suit for redemption and B, who had been in possession for many years, pleaded limitation:

*Held*, that the suit was governed by Limitation Act, Schedule II, Article 134.

[D., 15 Ind. Cas. 609 (610).]

SECOND appeal against the decree of H. G. Joseph, District Judge of South Canara, in appeal suit No. 353 of 1895, affirming the decree of O. Chandu Menon, Subordinate Judge of South Canara, in original suit No. 24 of 1894.

Suit to redeem a mortgage, dated 12th June 1862. The plaintiff, on the 4th October 1864, purchased the property from the mortgagors, who, however, in 1868, executed a conveyance of the same property to the mortgagee, who was the predecessor in title of the defendant who now pleaded limitation. The Subordinate Judge dismissed the suit, and his decree was affirmed on appeal by the District Judge, who held that the suit was barred by limitation.

The plaintiff preferred this second appeal.

*Sankaran Nayar* and *Narayana Rau*, for appellant.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*), for respondent.

## JUDGMENT.

[152] Inasmuch as the plaint alleges that the original transaction was a mortgage and that was not denied by the defendant, we must treat

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* Second Appeal No. 1224 of 1896.

1897 Nov. 23. — APPELLATE CIVIL. — 21 M. 151.

it as such. It is contended that, as the mortgagee purported to transfer a title acquired since the mortgage and independently of it, the case is not governed by Article 134 of the schedule to the Limitation Act. In effect the defendant's vendor purported to transfer the full ownership, when in point of law he had only a mortgage right to transfer. This is exactly the case for which the article is provided.

We must dismiss the appeal with costs.

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21 M. 152.

## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.*

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VENKATARAYADU AND OTHERS (*Plaintiffs and Legal Representatives of Plaintiff No.* 2), *Appellants v.* RANGAYYA APPA RAU AND OTHERS (*Defendants Nos.* 1, 2 *and* 4 *to* 9 *and Legal Representatives of Defendant No.* 9), *Respondents.** [23rd and 30th November, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Section* 2—*Appeal against order rejecting an insufficiently stamped appeal.*

An appeal petition having been presented bearing an insufficient Court-fee stamp was returned to the appellant. After the period of limitation had expired it was presented again bearing a sufficient stamp together with a petition that it be received. The Appellate Court made an order refusing to admit the appeal: *Held*, that no appeal lay to the High Court.

[D., 8 C.W.N. 64.]

SECOND appeal against the decree of E. C. Rawson, Acting District Judge of Kistna, rejecting an appeal against the decree of N. Saminatha Ayyar, Subordinate Judge of Ellore, in original suit No. 12 of 1892.

The order appealed against was as follows:—

"The appeal cannot be admitted. Even on petitioner's own showing, " a ten rupees stamp was required, only an eight anna stamp was affixed " to the appeal, and it was accordingly returned. [153] It is too late to " rectify the stamp duty now. The petition must be dismissed."

Plaintiffs preferred this second appeal.

*R. Subramania Ayyar*, for appellants.

*Ramasubba Ayyar* and *P. Subramania Ayyar*, for respondent No. 1.

*Tiruvenkatachariar*, for respondent No. 5.

*Anandacharlu*, for respondent No. 6.

## JUDGMENT.

Objection is taken to the maintenance of this appeal as being made against an order in respect of which no appeal is allowed by the Code of Civil Procedure. The appeal could only be justified on the ground that the order of the District Judge amounted to a decree within the meaning of the code. But as the District Judge had no appeal before him, it is impossible to say that he passed a decree. It must be assumed, and indeed it is not disputed, that the Judge was right in determining the amount of the fee chargeable, and it follows that the memorandum of appeal not

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* Second Appeal No. 13 of 1896.

being properly stamped, was of no validity whatever (Section 28, Court Fees Act). Consequently there having been no appeal and no appellate decree, there can be no second appeal.

The appeal is dismissed with costs.

1897 Nov. 30. — Appellate Civil. — 21 M. 152.

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21 M. 153=8 M.L.J. 92.

## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.*

ITTAPPAN (*Defendant*), *Appellant* v. MANAVIKRAMA (*Plaintiff*), *Respondent*.* [8th, 10th to 12th, 15th to 19th, 22nd and 23rd November, and 17th December, 1897.]

*Limitation Act—Act XV of* 1877, *Schedule* II, *Articles* 142, 144—*Suit for partition between co owners—Possession of tenants—Adverse possession—Civil Procedure Code—Act XIV of* 1882, *Section* 43—*Cause of action.*

The plaintiff was the Zamorin of Calicut, and he sued in 1887 for a moiety of certain property in Malabar alleged to belong in equal undivided shares to his stanom and that of the defendant and to be in the occupation of tenants. The cause of action was stated to have arisen in 1881 when partition was demanded by the Zamorin and refused by the defendant. In some instances the tenants in [154] occupation represented the family, a member of which was at one time admitted by the Zamorin under a demise or kanom, and had attorned to the defendant; in other instances they were shown to have been admitted by the defendant on paying off the former tenant who had been admitted by the Zamorin. In all these instances the defendant intended the tenant who attorned to him to hold as his tenant to the exclusion of any claim by the Zomorin, but it was not shown that the Zamorin had any notice of such attempted usurpation on the part of the defendant. And on these facts the defence of limitation was raised on the ground that the land had been held for more than twelve years adversely to the Zamorin. It appeared further that the Zamorin had previously brought suits and obtained decrees for partition of certain parcels of land as belonging equally to the two stanoms, the defendant in each suit being the present defendant and the tenant in occupation of the land then in question. And on these facts a further defence was raised under Civil Procedure Code, Section 43:

*Held*, (1) that Limitation Act, Schedule II, Article 144 and not Article 142 was applicable to the suit, and that in the first class of cases referred to above, the tenancy under the Zamorin had not been determined, and that in the second class, there had been no ouster of the Zamorin, and that consequently the suit was not barred by limitation;

(2) that the suit was not barred by Civil Procedure Code, Section 43, by reason of the previous suits.

[F., 31 C. 970=9 C.W.N. 32; 4 Ind. Cas. 298 (299)=5 L.B.R. 112; R., 27 B. 43 (53); 35 C. 961=6 C.L.J. 735=12 C.W.N. 127; 26 M. 104 (107); 33 M. 317 (322)=5 Ind. Cas. 735 (737)=7 M.L.T. 373=1910 M.W.N. 35; 34 M. 402 (403)=5 Ind. Cas. 491=20 M.L.J. 323=7 M.L.T. 155; 6 C.W.N. 601 (611); 17 C.W.N. 521 (522)=16 Ind. Cas. 383; 8 Ind. Cas. 691 (694); 9 Ind. Cas. 424 (425); 10 Ind. Cas. 554 (555)=5 S.L.R. 49; 19 M.L.J. 255=4 M.L.T. 327=6 M.L.T. 166; 5 N.L.R. 41; Expl., 24 M. 246=10 M.L.J. 415; 12 M.L.J. 194.]

APPEALS against the decree of V. P. DeRozario, Subordinate Judge of Palghat, in original suit No. 41 of 1887.

The plaintiff, the Zamorin of Calicut, sued for an allotment to him, by partition of a moiety of the properties described in the schedule attached to the plaint, which were alleged to belong to his stanom and to the stanom of the defendant, the Kuthiravattath Nayar, in equal undivided shares, and to be in possession of tenants. The plaintiff stated that the

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* Appeals Nos. 133 and 129 to 132 of 1894.

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cause of action arose in 1057 (1881-82) when his demand for partition was not complied with by the defendant. The defendant contended that the plaintiff's present suit was barred under Civil Procedure Code, Section 43, as the claim in this suit was not included in former suits brought by the plaintiff and by his predecessor. One of these suits was original suit No. 360 of 1869, which was brought by the Zamorin in the Munsif's Court at Temelprom to recover with arrears of rent, a moiety of twelve items of land from a tenant, to whose deceased father the plaintiff's predecessor had let such moiety. In the plaint non-payment of rent by the tenant and non-acceptance of a renewal by him were alleged, and the plaintiff added that he was not willing to allow the lands to remain in the possession of the tenant. In that suit the present defendant was joined as defendant. The Munsif passed a decree for the payment of the arrears of rent, but disallowed the prayer for possession of [155] a divided moiety. This latter prayer was allowed by the Civil Judge on appeal and his decision was confirmed by the High Court (Exhibit D). It was contended that that suit was virtually a suit for partition of a portion of the property alleged to have been held by the plaintiff on the same right as the property in the present suit, that his cause of action in that suit and his cause of action in the present suit were the same, *viz.*, his right to obtain partition. The other suits relied upon by defendant as constituting a bar under Section 43 to the present suit were of the same description as original suit No. 360 of 1869. The tenants in occupation sided with the defendant having, for many years, recognised him as their landlord. Some of them represented persons let into possession as kanomdars by the Zamorin, and others had been let in by the defendant. It was contended that the suit was barred by limitation. The Subordinate Judge passed a decree for the plaintiff in respect of part of the property in question.

The defendant preferred this appeal.

*Sundara Ayyar* and *Subramania Sastri*, for appellant.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*), *Desikachariar* and *Govinda Menon*, for respondents.

## JUDGMENT.

SHEPHARD, J.—The first point taken in the argument of this appeal is that raised by the third issue. It appears from the evidence, and indeed is in a measure admitted in the plaint itself, that before this suit was launched several suits were brought by the plaintiff or his predecessor against the defendant or his predecessor, in some of which suits decrees were obtained by the Zamorin for the partition of the particular parcels comprised in such suits. In each of these suits the tenant, who, as the plaint states and is admitted, held half under the Zamorin and half under the Nair, was joined as a party. So far as regards the tenant, the plaint made such allegations and asked for such relief as would be made and asked for against any tenant holding under a *jenmi*, while as regards the Nair, the plaint asked for partition, so that in the result the tenant might be left in undisturbed possession of the moiety allotted to the Nair. Independently of these suits there was another suit brought against the Nair alone in which a division of the *devasvom* property was sought for. That suit was dismissed on the ground that such property was not partible.

In these circumstances we are asked to hold that Section 43 of the Civil Procedure Code applies and that the plaintiff, having in [156] his former suits omitted to sue in respect of the property now in question, is

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precluded from maintaining the present suit for partition of that property. Stated in the abstract, the question may be said to be whether one of two tenants in common, having sued for partition of part of the property so held by them, is at liberty to bring a separate suit for the remainder of the property. Now it is quite clear that, in applying Section 43 of the Code, it has first to be seen whether the cause of action alleged in the plaint is identical with the cause of action alleged in the former suit (*Pittapur Raja* v. *Suriya Rau* (1), *Mussummat Chand Kour* v. *Partab Singh* (2), *Moonshe Buzloor Ruheem* v. *Shumsoonnissa Begam* (3)) and that by the term cause of action must be understood all the circumstances alleged by the plaintiff to exist which, if proved or admitted, will entitle him to the relief prayed for (*Mussummat Chand Kour* v. *Partab Singh* (2), *Read* v. *Brown* (4)). The class of cases to which Section 43 is intended to apply is indicated by the illustration. Where there has been an infringement of one right and one cause of action has arisen the plaintiff must make his whole claim once for all in one suit. For instance, a plaintiff, who complains of wrongful detention or misappropriation of his securities, cannot, after recovering the securities or some of them in one action, afterwards sue to recover the remainder, or damages for the detention of them (*Moonshee Buzloor Raheem* v. *Shumsoonnissa Begum* (3), *Serrao* v. *Noel* (5)). There being one single cause of action and the plaintiff having had "an opportunity in the former suit of recovering what he seeks "to recover in the second, the former recovery is a bar to the latter "action." The rule of law embodied in Section 43 operates not to give the defendant a ground of exception to the first suit, but, by prohibiting a second suit, indirectly to compel the plaintiff to include his whole demand in the first suit. There are, however, cases in which the nature of the right is such that independently of Section 43, the plaintiff is prohibited from severing his claim. For example, a mortgagor cannot redeem part of the mortgaged property on payment of a proportionate part of the mortgage debt. It is the right of the mortgagee to retain the whole security for any part of the debt. If the mortgagor chose to relinquish a part [157] of the mortgaged property and sought to recover the remainder on payment of the whole debt, the mortgagee would have no reason to complain and he would, under Section 43, have a complete answer to a second suit brought to recover the omitted part (see *Ukha* v. *Daga*(6)). But it is another question whether, when a prayer for partial redemption has been granted or refused, the mortgagor can institute another suit. If the prayer were refused, that is, if the mortgagee insisted on his right to have the whole mortgage redeemed once for all, I conceive that the dismissal of the first suit would clearly be no bar to the institution of a second and properly-framed suit. The case of *Kakaji Ranoji* v. *Bapuji Madhavrav* (7) is an authority, if any is needed, on this point. Would it make any difference if the prayer for partial redemption were granted, with the result that the mortgagee was allowed to remain in possession of part of the property as security for the unpaid portion of the debt? The difference is one not recognized in Section 43 and therefore if there is any distinction to be drawn the reason for it must be sought elsewhere. In the case above cited the plaintiff, a member of an undivided family, had first demanded a share of a particular portion of the family property. That suit had been dismissed on the ground that it was not properly framed. The

(1) 8 M. 520. (2) 15 I.A. 156. (3) 11 M.I.A. 551 (605).
(4) L.R. 22 Q.B.D. 128. (5) L.R. 15 Q.B.D. 549.
(6) 7 B. 182. (7) 8 B.H.C.R. A.C.J., 205.

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plaintiff then sued to have the whole property brought together and divided. It was observed by Melvill, J., with reference to the argument that the suit was barred by Section 7 of the Code of 1859, that "so far "from these two being the same cause of action, they present all the "difference which is expressed by saying that the one is a cause of action "and the other is no cause of action." This observation, it appears to me, would have been none the less true if the first suit instead of being dismissed had been decreed in the plaintiff's favour. The cause of action as alleged in the plaint cannot be altered by the result of the suit. Nor can it possibly be held that a decree for partial redemption or partial partition estops the plaintiff from claiming redemption or partition of the rest of the property or from alleging that it is held by the defendant as mortgagee or tenant in common. If there is any estoppel in the matter, it is rather against the defendant than against the plaintiff. In the present case it appears to me that the right put forward in the former suits is [158] different from that put forward in the present suit, and that therefore there is no identity of causes of action. The right on the part of a tenant in common to have each field separately divided between himself and his co-tenant is one thing: the right to claim a partition of all the fields held by them as tenants in common is another thing. There has no doubt been an adjudication as to certain parcels of land on the footing of an alleged right of the former sort. To hold that that circumstance prohibits a general suit for partition would lead to the remarkable conclusion that the tenancy in common in respect of the yet undivided lands must continue indissoluble except by consent of the parties or perhaps by suit instituted by the Nair. As far as the Zamorin is concerned, he must for ever be in the position of a tenant in common who has no right to partition. Similarly in the analogous case of mortgagor and mortgagee, the latter, it is supposed, may continue to hold part of the land under the mortgage, while the former is debarred from bringing any further action. In both cases the explanation is the same. It cannot be said that the causes of action are identical when the one plaint omits matters which the defendant is entitled to have included and the other is not open to that exception.

These reasons are sufficient, without any discussion of the circumstances of the different suits that have been brought by the Zamorin, for holding that the present suit is not barred by the provisions of Section 43. I would only add that I do not think the cases relied on by the Advocate-General in which a member of an undivided family has been permitted to sue his co-parcener and a purchaser from the latter for partition of the property purchased, can be called in aid in the present case. In that class of cases it may be said that the plaintiff, adopting the alienation and seeking to have the purchaser's right defined, consents to a separation of the particular property from the rest of the family estate. The circumstances in the present case are entirely different.

The other point urged with regard to several of the parcels of land comprised in the suit was that of limitation. It was contended that, in the circumstances of this case, the suit fell within Article 142 of the Schedule to the Limitation Act, and that, therefore, the burden lay on the plaintiff of proving that possession remained with him till some time within twelve years of the institution of the suit. The answer to this, in my opinion, is that [159] it must not be assumed that the plaintiff has been dispossessed so as to render Article 142 applicable to his case. The defendants's possession must *prima facie* be referred

to the title in virtue of which it may have been lawfully enjoyed. At the outset his possession was that of a tenant in common, not inconsistent with the title of the plaintiff, and therefore it lies upon him to show that his possession has assumed another character and has become inconsistent with the plaintiff's title. There being no article especially applicable to the case of tenants in common, Article 144, which is appropriate to the case of a possession which was in the beginning lawful but has become adverse, must be applied. Now as between tenants in common mere non-participation of the profits by the one tenant and exclusive occupation by the other is not sufficient to entitle the former to a decree for joint possession or consequently to make a case of adverse possession (*Watson and Company* v. *Ramchund Dutt* (1)). The party claiming to hold adversely must at least go on to prove that it was in denial of the other's title that he excluded him from enjoyment of the property. According to the English cases there must be something amounting to ouster of the person against whom adverse possession is claimed (*Culley* v. *Doe d. Taylerson* (2)). An ouster can be presumed to have taken place only when non-participation of the profits has lasted for a considerable time and other circumstances concur. In the present case the actual enjoyment of all the holdings has been in the hands of tenants and not in those of the Nair, and in all the instances in which any question of limitation arises it has been proved that the Zamorin took part in admitting the original tenant. There are two classes which need consideration. There are the cases in which it appears that the present tenant represents the family, a member of which at one time was admitted by the Zamorin and attorned to him. And there are the cases in which the present tenant is shown to have been admitted by the Nair on paying off the former tenant who has been admitted by the Zamorin. There is evidence in all these cases that the Nair intended the tenant who attorned to him to hold as his tenant to the exclusion of any claim by the Zamorin, but it is not shown that the Zamorin had any notice of this attempted usurpation on the part of the Nair. In the first class of cases where the present [160] occupant of the land can be identified in point of law with the tenant who was at one time admitted by Zamorin, it is clear that the Zamorin has not lost his right of action against him, unless it appears that the tenancy has been determined. If the tenant were sued and relied upon Article 142 of the Limitation Act, it would lie upon him to prove that the tenancy had been determined more than twelve years before the date of the suit. This would be so even if the holding of the tenant had been reduced to that of a tenant by sufference (*Adimulam* v. *Pir Ravuthan* (3), and such a designation would certainly not be appropriate to tenants of the Zamorin who, whether or not there was a *kanom*, were at any rate entitled to compensation for improvements before they could be ejected. The only possible way in which it could be suggested that the tenancy had been determined, would be by forfeiture consequent on the tenant's implied denial of the landlord's right. But the landlord is not bound to insist on a forfeiture when the occasion arises, and unless he elects to do so, the tenancy remains unaffected. A disobedience by the tenant, known to the landlord and accompanied by payment of rent to a third party, does not, at any rate as long as the term of his tenancy lasts, make the tenant's possession adverse; though in the case of a tenancy at will such conduct might afford evidence of the determination of the tenancy. (*See Doed. Graves* v.

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(1) 18 C. 10. (2) 11 A. & E. 1008. (3) 8 M. 424.

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*Wells* (1), where it appears that the dicta of Lord Redesdale in *Hovenden* v. *Lord Annesley* (2) were not adopted). Here it is not even proved that the landlord was apprised of the tenant's conduct.

Holding with regard to the first class of cases that the tenancy is not proved to have been determined, I think it follows that the Nair's possession was not adverse, for it was only by ousting the tenant or putting an end to the tenancy that the Nair could acquire adverse possession. In the other class of cases there is the circumstance that the present tenant is one who has been admitted by the Nair alone in supersession of the tenant who had attorned to the Zamorin. In these cases the original tenancy was lawfully determined and the present tenant has never attorned to the Zamorin. Nevertheless, I think it is impossible to hold that the Zamorin has suffered anything in the nature of an ouster. If there had been no tenancy in common and the present tenant had simply taken [161] over possession from the original tenant, there could be no question of adverse possession. The fact that the Nair took part in the transaction and took an acknowledgment from the new tenant cannot by itself alter the nature of the Nair's possession. The admission by the Nair of a new tenant was not *per se* inconsistent with the rights of his tenant in common. It is not necessary to consider the question which would arise if knowledge of the action of the Nair in consert with the tenants had been brought home to the Zamorin. No circumstances have been proved from which such knowledge could be inferred.

For these reasons I think that the plea of limitation fails in both the above-montioned classes of cases.

SUBRAMANIA AYYAR, J.—Of the several suits referred to in support of the contention that the present claim is barred under Section 43 of the Code of Civil Procedure, all, excepting the one which related to certain *devasvom* lands, are more or less similar in their character and may be considered together. Those suits were based on demises of some parcels of land out of the whole property held by the plaintiff, the Zamorin, and the defendant, the Nayar, as co-owners. In them not only the tenants, who held under the demises and against whom part of the relief was claimed, were made defendants, but also the co-owner, and a division by metes and bounds of the parcels to which the demises related was sought. Though the frame of these suits is ambiguous, yet the suits, in so far as the co-owner was concerned, cannot but be treated as suits for partition of the parcels then in dispute. Now the question is whether the cause of action in any of those suits is identical with that in the present suit. It is impossible to doubt that the claim for partition in each of those suits was on the footing that the plaintiff was entitled to a partition confined to the particular parcels comprised in the demises to the tenants who were impleaded in each suit. This view of the Zamorin's right is of course wrong. But strangely enough, not only both the co-owners and their advisers but even the Courts, that had to deal with the suits, continued up to at least 1877 to act as if a claim for such partial partition was sustainable in law. Unquestionably the cause of action thus relied on in each of those suits is different from that in the present suit since the latter is based upon a right which, unlike that alleged in the previous suits, the Zamorin undoubtedly has, to a general and complete partition of the entire property held by him and the [162] defendant. *Kakaji Ranoji* v. *Bapuji*

(1) 10 A. & E. 427, at p. 434.

(2) 2 Sch. & Lef. 625.

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*Madhavrav* (1) is an authority in point, and *Ukha* v. *Daga* (2) is distinguishable on the ground that there the two suits were on the same right which the plaintiff alleged gave him a title to a share of what had been left undivided at a private partition.

Next as to the suit about the *devasvom* lands also the conclusion must be the same. In it the plaintiff sought as one of the two trustees of the *devasvom* a partition of the lands forming the endowments of the institution. That was the right alleged though in law he had no such right. How then can that claim bar a suit in respect of the absolutely different right on which the present claim rests and which undoubtedly the plaintiff has? Clearly therefore it must be held that none of the suits relied on bars the present claim under Section 43.

As to the next point taken, *viz.*, limitation, the article applicable is clearly not 142 as was contended for the defendant, but 144. And the question is whether the defendant has held adverse possession for the statutory period in all or any of the cases in which the plea was urged. The facts material so far as that question is concerned are these. The plaintiff and the defendant are co-owners standing in the relation of tenants in common. Some parcels of land have been held by tenants who originally came into possession under demises or *kanom* mortgages granted by the predecessors of the plaintiff in respect of their undivided share, or privies of those who so entered into possession or parties to whom the property was, at the instance of the defendant or his predecessors, subsequently handed over by the Zamorin's tenants. These persons attorned to the defendant's predecessors or the defendant himself and paid rent accordingly. From this the defendant contends that though he has not held direct and actual possession, yet the possession held through these tenants is sufficient to render the possession adverse as against the plaintiff. In dealing with a case such as this some of the special rules governing the matter of adverse possession with reference to persons standing in the relation of landlord and tenant, of mortgagor and mortgagee and of tenants in common, have to be borne in mind. And what are these rules?

First, as to landlord and tenant.—Now a tenant's possession, unlike that of a stranger, is, in its inception, in subserviency to and [163] consistent with the landlord's title, and as, during the existence of the tenancy, the tenant is bound to protect the interest of the landlord, the latter has a right to act upon the supposition that his interest has not been betrayed and that no change in the character of the possession has taken place unless and until it is brought home to him that the contrary is the case. Therefore, though the law does not absolutely disable a tenant from disclaiming his landlord's title and claiming to hold in his own right, yet if he does so, "the statute does not begin to operate until the possession before consistent with the title of the real owner becomes tortious and wrongful by the disloyal acts of the tenant, which must be open, continued and notorious so as to preclude all doubt as to the character of the holding or the want of knowledge on the part of the owner." (See *Zellar* v. *Eckhart* (3) cited in Angell on Limitation, sixth edition, page 458.) It should be added, however, that if the disavowal of the landlord's title and the assertion of the claim to hold on the tenant's own account take place during the currency of a definite term, then the

(1) 8 B.H.C.R. A.C.J. 205. (2) 7 B. 182.
(3) 4 How. (U.S.), 89, at p. 296.

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tenant's possession does not necessarily become adverse immediately. For in such a case the term would become forfeited only if the landlord does some act showing his intention, on the ground of the denial of his title, to determine the tenancy. In the absence of such act, the term subsists and the possession is, in law, possession under the lease. But the moment the term comes to its natural termination by effluxion of time the disloyal tenant's possession becomes adverse. The Advocate-General in his argument went further. He contended that even after the expiry of the term the character of the possession remains unaltered so long as either the landlord or the tenant does not, by express notice to the other, put an end to the tenancy. Now, the expiry of the term by effluxion of time coupled with the continuing denial by the tenant that his holding was under the landlord's title, renders impossible the arising between the parties of even a tenancy by sufferance. What tenancy can there be then between the parties which requires to be put an end to by express notice? None. And it follows, as already stated, that the possession in such a case becomes on the expiry of the terms *ipso facto* absolutely wrongful—wrongful with respect to both the parties concerned. For that would indeed be an anomalous possession which, as to the rights of **[164]** one party, was adverse, and as to the other fiduciary; and if as a consequence of a disclaimer with the knowledge of the landlord and the setting up of a title in himself, the tenant forfeits his possession as tenant and the other benefits incident to the character of a tenant, he ought to be entitled to the advantage which would result from his known adverse possession (see *Willison* v. *Watkins* (1) cited in Angell on Limitation). And the same observations apply to the case of a tenant from year to year who denies his landlord's title. For such denial is in itself, as all the Judges pointed out in *Doe d. Graves* v. *Wells* (2) evidence of the cessation of the tenancy. And hence it is that in such a case the tenant is liable to be ejected without notice to quit. The contention of the Advocate-General is therefore opposed to principle and unsupported by authority. And the decisions in Indian cases on the point imply that the rule of law as to it is as stated above. If, instead of claiming title in himself, the tenant attorns and pays rent to or hands the property over to a third party who claims against the landlord, it follows, from what has been stated above, that the possession of the third party is adverse to the original owner provided the owner has knowledge of the facts; subject of course, if the tenancy be for a definite term, to the observations made above in dealing with the case of a tenant setting up title in himself.

Passing now to the case of mortgagor and mortgagee, mere denial by a mortgagee in possession or by the representative of the mortgagee in possession of the mortgagor's right to redeem is of itself not sufficient to convert such possession into adverse possession (*Mussad* v. *The Collector of Malabar* (3)). Now there can be no doubt that if the interest of the mortgagee alone is assailed by a third party, that of the mortgagor is not thereby affected. But where the mortgagor has made over possession of the mortgaged property to the mortgagee and while he is so out of actual possession, the former's interest is invaded, Turner, C.J., and Muttusami Ayyar, J., in *Ammu* v. *Ramakrishna Sastri* (4) treat such invasion as an ouster. Innes and Muttusami Ayyar, JJ., however, in *Chathu* v. *Aku* (5)

(1) 3 Peters (U.S.), 51, at p. 53. (2) 10 A. & E. 427 at p. 435.
(3) 10 M. 189. (4) 2 M. 226 (229). (5) 7 M. 26 (28).

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speak of the right to redeem as a mere right of action; though there are observations in the course of the same judgment [165] which show that if the party claiming in antagonism to the mortgagor had taken and held possession of the mortgaged property itself for twelve years, such possession would bar the mortgagor as was held in *Ammu* v. *Ramakrishna Sastri* (1). Compare *Moidin* v. *Oothumanganni* (2). This last conclusion is in conflict with the opinion expressed by Telang, J., in *Chinto* v. *Janki* (3). The reason for that opinion is stated by the learned Judge thus: "The mortgagor having once put the mortgagee in possession ordinarily "has no right to the possession himself until the mortgage is paid off. "The mere fact of the mortgagee's letting the property go out of his "possession cannot give the mortgagor such a right before payment. "And the party in possession, though he may be a trespasser, would ordi-"narily be able to defend an action of ejectment at the suit of the mort-"gagor by setting up *jus tertii*." And notwithstanding *Puttappa* v. *Timmaji* (4), it would be seen from the later case of *Vinayak Janardan* v. *Mainai* (5) that the above opinion of Telang, J., commended itself as sound to Sargent, C.J., and Candy, J. In this state of the authorities, if I may express my own inclination, I would with deference say that Justice Telang's view appears to be the better view. If, however, that adopted in *Ammu* v. *Ramakrishna Sastri* (1) be the correct one, still the possession of the person taking it from the mortgagee would not be adverse unless and until the mortgagor has notice of it (*Mussad* v. *The Collector of Malabar* (6)).

Lastly as to the case of tenants in common, the special characteristic of their right is united possession. Each has a present right to enter upon the whole land and upon every part of it and to occupy and enjoy the whole. And if one tenant in common occupied and took the whole profits, the other has, apart from statute, no remedy against the former whilst the tenancy in common continues unless he was put out of possession when he might have his ejectment, or unless he appointed the other to be his bailiff as to his undivided moiety and the other accepted that appointment, when an action of account would lie as against a bailiff of the owner of the entirety of an estate (*Henderson* v. *Eason* (7)); see also *Watson and Company* v. *Ramchand Dutt* (8); [166] and *Lachmeswar Singh* v. *Manowar Hossein* (9). Consequently, sole occupation by one tenant in common is *prima facie* not inconsistent with the right of any other tenant in common. And in such cases there is no ouster or adverse possession until there has been a disclaimer by the assertion of a hostile title and notice thereof to the owner either direct or to be inferred from notorious acts and circumstances.

Such being the rules applicable to a case like the present, how does the matter stand upon the facts here? It may be shortly observed that the possession relied on by the defendant amounts at the highest to nothing more than sole occupation by one of two tenants in common. In none of the instances, in which limitation is pleaded, express disclaimer of the co-owner's right and notice thereof to him are either alleged or established and the facts relied on as proof of adverse possession seem only to show what has been termed "silent possession." And when regard is had to the position of the parties, to the fact that the parcels of land as to which adverse possession is set up are so few compared with the

(1) 2 M. 226 (229). (2) 11 M. 416. (3) 18 B. 51 (58).
(4) 14 B. 176. (5) 19 B. 138. (6) 10 M. 189.
(7) 17 Q.B. 701, at p. 718. (8) 18 C. 10. (9) 19 C. 253.

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large number of isolated parcels admitted to have been held jointly and to the nature of the demises under which the disputed parcels were or held by the actual occupants thereof, it is impossible to come to the conclusion that what are relied on as supporting the contention in question constitute such open and notorious acts of exclusive ownership as, in law, are necessary to warrant the inference that one tenant in common has been ousted by the other. The plea of limitation must therefore be held to fail in all the instances in which it was urged.

I concur in the conclusion arrived at by my learned colleague.

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**21 M. 167.**

## [167] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

RAMACHARI (*Defendant No.* 1), *Appellant v.* DURAISAMI PILLAI (*Plaintiff No.* 1), *Respondent.**
[2nd September, 1897 and 17th January, 1898.]

*Civil Procedure Code—Act XIV of* 1882, *Section* 443—*Suit against a major defendant by guardian* ad litem—*Acquiescence.*

The managing member of a Hindu family consisting of himself and two brothers, who were minors, mortgaged the ancestral property to secure a debt properly incurred by him in his capacity as manager. The mortgagee brought a suit upon the mortgage joining as defendants the three brothers; the two younger of whom were sued by the mortgagor as their guardian *ad litem.* A decree for the plaintiff having been passed, the lands were sold in execution. The two younger brothers now sued to have the decree and the sale set aside as regards them, on the ground that they had both been of age at the date of the suit, and accordingly had been wrongly impleaded. It appeared that the elder plaintiff was in fact a major at the date of the previous suit, but he was aware, prior to the sale, of the suit and the execution proceedings, and still allowed his elder brother to conduct the defence and proceedings on his behalf:

*Held*, that both plaintiffs were bound by the decree in the former suit.

[R., 7 O.C. 234.]

SECOND appeal against the decree of T. M. Horsfall, District Judge of Tanjore, in appeal suit No. 421 of 1895, modifying the decree of A. Ramaswami Sastrigal, District Munsif of Tiruvalur, in original suit No. 94 of 1894.

In 1887 one Saminada Pillai, an undivided brother of the present plaintiff, mortgaged certain lands to Sabapathi Pattan, who brought a suit in 1882 on the mortgage impleading as defendants the mortgagor and the present plaintiffs who were then minors. A decree was passed for the plaintiff and the mortgage property was sold in execution. The present plaintiffs now sued to have the decree set aside and the sale cancelled so far as their shares in the lands were concerned. They alleged that the decree had been obtained by fraud to which their brother was a party, and that they were, as a matter of fact, majors at the time of the suit. The defendants were the purchaser, the mortgagee, and the mortgagor. The mortgagor did not defend the suit; the [168] other defendants pleaded that the mortgage-debt was binding on the family, and that the plaintiffs were in fact minors at the date of the suit.

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The District Munsif held that the present plaintiff No. 1 was a major and had been wrongly impleaded as a minor in the previous suit, that plaintiff No. 2 was rightly impleaded as a minor, and that defendant No. 3 had incurred the mortgage-debt as the manager of the family and had fraudulently instigated the present suit. On these findings he dismissed the suit holding that the decree was binding upon the plaintiffs' shares.

The District Judge on appeal referred to *Bhawani Prasad* v. *Kallu* (1), and framed a fresh issue as follows: "whether defendant No. 3 was manager at the time and executed the bond as manager."

The District Munsif tried that issue, and he found that the third defendant was the manager and executed the bond as such.

The District Judge finally passed a decree, by which the first plaintiff's share in the mortgage property was exonerated, and the decree of the former suit and the subsequent sale was set aside as regards his share.

Defendant No. 1 preferred the second appeal.

*Pattabhirama Ayyar*, for appellant.

*Sankaran Nayar*, for respondent.

## JUDGMENT.

This case is unlike the Allahabad case quoted by the Judge as his authority for exonerating the first plaintiff from the decree, inasmuch as the first plaintiff was, as a fact, made a party to the suit. Although it has now turned out that he was a major at the time of suit, whereas he was treated in the suit as a minor, he must be held to be bound by the decree if he was aware, prior to the sale, of the suit or the subsequent proceedings, and still allowed the manager of the family to conduct the defence and proceedings on his behalf which the manager in truth did. The plaintiff has not averred in his plaint or elsewhere that he was ignorant of the suit and proceedings, and there are circumstances indicating that he must have been aware of them, but as the point was not put distinctly in issue, the question has not been tried. We think it ought to be tried now, and we remit the following issue for trial:—

**[169]** "Whether the first plaintiff was aware, prior to the date of "the sale, of the suit No. 340 of 1892, or of the execution proceedings "therein."

[In compliance with the above order, the District Judge submitted the following finding:—

"On the evidence of the defendants, first and second witnesses, I "find that the first plaintiff was aware of the suit No. 340 of 1892 from "the date when the third defendant was first served with notice of "the suit."]

## JUDGMENT.

The evidence relied on by the Judge, together with the probabilities of the case, coupled with the circumstance that the first plaintiff never denied that he was aware of the suit and subsequent proceedings, are sufficient to support the finding. The sale is therefore binding on the first plaintiff also. The result is that the decree of the Lower Appellate Court is reversed with costs in this and in that Court, and the decree of the Munsif dismissing the suit with costs is restored.

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(1) 17 A. 537.

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## APPELLATE CIVIL.

*Before Mr. Justice Davies and Mr. Justice Benson.*

MUNIAPPAN CHETTI AND OTHERS (*Defendants Nos.* 5 *to* 8), *Appellants v.* MUPPIL NAYAR AND ANOTHER (*Plaintiffs*), *Respondents.**
[13th and 19th January, 1898.]

*Limitation—Adverse possession—Suit for ejectment by a jenmi—Defendant in possession under Government cowle.*

The plaintiffs sued for possession of land which was found to be their jenm. It appeared that the defendant had been in possession for more than twelve years under a cowle from Government, which provided that the grant of the cowle should not affect the jenmi's right, but that the defendant had never recognized the plaintiffs' title:

*Held*, that the suit was barred by limitation.

SECOND appeal against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in appeal suit No. 189 of 1895, confirming the decree of P. P. Raman Menon, District Munsif of Nedunganad, in original suit No. 366 of 1892.

[170] The plaintiffs sued to recover possession of certain land which was found to be their jenm property. It was alleged that the plaintiffs' predecessor in title had demised the land in 1862 to one Koru, the predecessor in title of defendants Nos. 1 to 3. It appeared that in the following year Koru obtained from Government a cowle and that he and the defendants who were his assignees had been in possession ever since. The District Munsif passed a decree for the plaintiff which was affirmed on appeal by the Subordinate Judge, who held that, whether or not the land had been demised to Koru in 1862 as alleged, there had been no possession adverse to the plaintiffs.

Defendants Nos. 5 to 8 preferred this second appeal.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*), *Pattabhirama Ayyar* and *Subramania Sastri*, for appellants.

*Sankaran Nayar*, for respondent No. 1.

*Ryru Nambiar*, for respondent No. 2.

## JUDGMENT.

In this case it has been found that the jenm title to the plaint land was in the plaintiffs, and that in 1863 one Koru obtained from Government a cowle to cultivate the land, and that he and his assignees (defendants Nos. 5 to 8), have been in possession ever since. It was alleged that Koru originally got possession of the land under an oral lease from the first plaintiff in 1861-62, but the Subordinate Judge did not decide that question, holding that even if Koru took possession of the land on the strength of the Government cowle and without reference to the jenmi, such possession must be regarded as not hostile to the jenmi, who was, therefore, entitled to recover at any time on the strength of his title. The Subordinate Judge therefore decreed that plaintiffs should recover possession on payment of compensation for improvements.

Against this decree the defendants Nos. 5 to 8 appealed on the ground that the plaintiffs' suit is barred by limitation. We have no doubt but

* Second Appeal No. 1203 of 1896.

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that this is so, unless the letting to Koru in 1861-62 alleged by the plaintiffs is proved. The effect of the grant of a cowle *quoad* the jenmi has often formed the subject of judicial decision (Wigram's 'Malabar Law and Custom' 137) and is well laid down in the case of the *Secretary of State* v. *Ashtamurthi* (1). It is expressly provided in the cowle that the jenmi's rights are [171] not affected by the grant of the cowle, and it is usual for the holder of the cowle to settle with the jenmi at the same time when he receives the cowle from Government. The cowle merely insures a favourable assessment of the Government dues on cultivation. Should the holder of the cowle fail to settle with the jenmi he may be evicted. Should he, however, be left in possession for more than twelve years without any recognition of the jenmi's right, he would like any other trespasser acquire a valid title by prescription. In the present case there was no recognition of the first plaintiff's right as jenmi. The learned pleader for the respondents contends that Exhibits 18 and 19 only convey Koru's right to improvements, and that this fact, together with the attornment by Koru to the twelfth defendant as jenmi in 1880, indicate that Koru did not claim the land as owner, and argues that unless he claimed to hold the land as owner the plaintiff's right could not become barred. He relies on a passage in *Sivasubramanya* v. *Secretary of State for India* (2) to the effect that possession will not generate a prescriptive right unless it is a possession with the intention to hold exclusively and as owner. This argument is untenable. The language must be understood in the light of the facts and arguments in that case, and when so understood, it has no reference to the present case. There the question was whether certain acts were evidence of ownership or merely of an easement. In the present case there is no question of easement at all. Moreover, there is nothing in Exhibits 18 or 19 or 1 to indicate that Koru at any time recognized the first plaintiff as jenmi. Exhibits 18 or 19 are as consistent with Koru's recognition of the rival jenmi (the twelfth defendant) as with his recognition of the plaintiff, and Exhibit I, by recognizing the latter, affords ground for supposing that Koru, if he meant to recognize any jenmi, meant to recognize the twelfth defendant rather than the first plaintiff. The first plaintiff then was out of possession and Koru was in possession for more than twelve years without any recognition of first plaintiff's right, and the plaintiff's right is therefore barred under Article 142 of Schedule II of the Limitation Act (*Kunchu Achen* v. *Sundaram Patter* (3)), unless as already stated, Koru's possession was that of a tenant under the oral letting alleged by the plaintiff.

We must therefore ask the Subordinate Judge to return a finding on this issue on the evidence on record within six weeks [172] of the date of receipt of this order. Seven days will be allowed for filing objections after the finding has been posted up in this Court.

The appellant's objection to the finding of the Subordinate Judge in regard to improvements are untenable. He did not, in the Lower Appellate Court, claim compensation for the kalam for which he now seeks compensation, nor did he, in the Court of First Instance, object to the principle on which the compensation for reclamation was calculated. He, in fact, accepted that principle, and he cannot now be allowed to object to it.

(1) 13 M. 89 (118). (2) 9 M. 285 (302).
(3) Second Appeal No. 785 of 1894 (unreported).

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## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

MADRAS RAILWAY COMPANY (*Defendant*), *Petitioner* v. GOVINDA RAU (*Plaintiff*), *Respondent*.*
[10th December, 1897 and 1st February, 1898.]

*Contract Act—Act IX of* 1872, *Section* 73—*Railways Act—Act XI of* 1890, *Section* 72—*Condition under which goods despatched by Railway—Deterioration—Remoteness of damage.*

The plaintiff who was a tailor delivered a sewing machine and some cloths to the Madras Railway Company (the defendant) to be sent to a place where he expected to carry on his business with special profit by reason of a forthcoming festival. Through the fault of the Company's servants the goods were delayed in transmission and were not delivered until some days after the conclusion of the festival. The plaintiff had given no notice to the Company that the goods were required to be delivered within a fixed time for any special purpose and he had signed a forwarding note under a statement that he agreed to be bound by the conditions at the back and one of those conditions was to the effect that the company is not liable "for any loss of or damage to any goods whatever by reason of accidental or unavoidable delays in transit or otherwise." The plaintiff now sued to recover from the Company a sum on account of his estimated profits and the travelling expenses of himself and his assistant at the place of delivery and their expenses for food and lodging while there.

*Held*, (1) that as the plaintiff had not shown that the goods had undergone deterioration in value or otherwise the condition above cited was not void under Railways Act 1890, Section 72, although it had not been approved by the Governor General in Council.

(2) that the plaintiff was bound by the condition even if he was in fact ignorant of its effect.

(3) that the damages claimed were too remote.

[173] PETITION under Section 25 of the Provincial Small Cause Courts Act praying the High Court to revise the decree of P. S. Gurumurti Ayyar, District Munsif of Erode, in small cause suit No. 1490 of 1896.

A suit for damages was brought by the plaintiff against the Madras Railway Company under the following circumstances. The plaintiff was a tailor. In view to make a special profit at Karamadai during the car festival to be held at that place he delivered a sewing machine and a bundle of cloths to the defendant Company at the Erode Railway Station on the 29th February 1896 to despatch to that place. The plaintiff went to Karamadai and waited there till the 13th of March when the festival was over; but the goods were not delivered to him until the 26th of March. The plaintiff gave no notice of the purposes for which they were despatched and it appeared that he had placed his signature on the forwarding note under a statement that he was aware of the conditions on the back of the note and agreed to be bound thereby and on the back of the note there were certain conditions including that set out above. The damages claimed were the railway fare of the plaintiff and his assistant to Karamadai and their expenses there including the rent paid for the shop and also the special profit expected to be earned at Karamadai at the time of the car festival and the ordinary profit expected to be earned during the subsequent days when the sewing machine and the cloths were in charge of the defendants.

* Civil Revision Petition No. 80 of 1897.

The District Munsif passed a decree for Rs. 16-4-0, being the amount of the railway fare of the plaintiff and his assistant to and from Karamadai and the sum actually spent by him when there. 1898 FEB. 1.

The defendant preferred this petition. APPEL-

Mr. *R. A. Nelson*, for petitioner. LATE

Respondent was not represented. CIVIL.

Mr. *R. A. Nelson*:—Railways Act, 1890, Section 72, does not apply here as there was no loss, destruction or deterioration. Consequently the conditions on the forwarding note afford a complete answer to the suit. Moreover, the damages claimed are too remote and indirect. These damages did not arise naturally nor did the Company know that such would be the result of non-delivery not having been informed of the object or purpose with which the goods were sent. Contract Act, Section 73; *Great* [174] *Western Railway Co.* v. *Redmayne* (1); *Woodger* v. *Great Western Railway Company* (2); *Simpson* v. *London and North Western Railway Co.* (3); Mayne on Damages, page 300. 21 M. 172= 8 M.L.J. 85.

## JUDGMENT.

SUBRAMANIA AYYAR, J.—The plaintiff, a tailor, with a view to make special profits during the car festival at a place called Karamadai in the Coimbatore District entrusted to the defendants, the Madras Railway Company, on the 29th February 1896, his sewing machine and a cloth bundle to be carried from Erode and to be delivered to him at Karamadai. The defendants were, however, not told why the articles were sent. Through the fault of the defendants' servants the articles were not carried to Karamadai until long after the date by which they should, in the usual course, have arrived at that station. Before they reached the place, the festival had come to an end. The plaintiff, who had waited at Karamadai for a number of days expecting the arrival of the articles, having returned to Erode, the articles were transmitted back and were delivered to him there on the 26th March 1896.

The plaintiff sued for damages said to have been sustained by him in consequence of the delay in the delivery of the articles. The District Munsif gave him a decree for Rs. 16-4-0, being the railway fare of the plaintiff and his assistant from Erode to Karamadai and back and their expenses for food and lodging while at Karamadai.

The first question that arises is whether the plaintiff is precluded from maintaining this suit by one of the conditions printed on the back of the forwarding note, Exhibit I. That condition is to the effect that the defendants are not responsible for any loss of, or damage to, the goods by reason of accidental or unavoidable delay in transit or otherwise. It no doubt appears that Exhibit I was neither read nor explained to the plaintiff. But, assuming that he was in fact ignorant of the condition in question, that does not affect the binding character of the contract evidenced by Exhibit I, inasmuch as in the portion thereof which bears his mark it is expressly stated that he was aware of the conditions on the back and that he agreed to the articles being carried subject to such conditions. (Per Mellish, L. J., in *Parker* v. *South-Eastern Railway Co.* (4).) He is therefore precluded from [175] maintaining this suit, unless such a condition is void under Section 72 of the Indian Railways Act. The

(1) L.R. 1 C.P. 329.
(2) L.R. 2 C.P. 318.
(3) L.R. 1 Q.B.D. 274.
(4) L.R. 2 C.P.D. 416 at p. 421.

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question then is whether the contract between the plaintiff and the defendants in so far as it purports to exonerate the latter from responsibility for delay is, as held by the District Munsif, void under Section 72 of the Railways Act IX of 1890. In discussing this point I shall proceed on the supposition that the condition covers a delay which, as found here, was neither accidental nor unavoidable. The section referred to in so far as it is material for our present purpose runs thus:

"72 (1) The responsibility of a railway administration for the loss, "destruction or deterioration of . . . . goods delivered to the administration to be carried by Railway shall, subject to the other provisions of this Act, be that of a bailee under Sections 151, 152 and 161 of "the Indian Contract Act, 1872.

"(2) An agreement purporting to limit that responsibility shall, in so "far as it purports to effect such limitation, be void unless it—

* * * *

"(b) is otherwise in a form approved by the Governor-General in "Council.

* * * *

Now, in the present case, there was no loss or destruction of the articles consigned and the applicability of the section to the case depends upon the question whether there was, within the meaning of the enactment, a "deterioration," for which the contract purports to render the defendants not responsible, since the words "damage to the goods" in the contract may be taken to comprehend deterioration. The word deterioration imports the becoming reduced either in quality or in value (see the Standard Dictionary). Having regard to the nature of the articles and to the very limited delay, it is not possible to suggest that any deterioration in quality could have taken place. As regards the value of the cloth, however, it might well have been shown to have been otherwise with reference to what was laid down in *Wilson* v. *Lancashire and Yorkshire Railway Co.* (1). There the plaintiff, a cap manufacturer, sued the defendants for damages caused by the improper delay in delivering some cloth. The plaintiff had bought the article with a view to make it into caps for sale during the spring season of the year, but owing to the delay in transit the plaintiff was unable to sell or use any part of it or to manufacture **[176]** any part of it into caps for sale in that season. Referring to the fall in the value of the cloth that could be shown to have taken place in consequence of the same arriving at a time when it was less in demand and less capable of being applied to an immediate use, Williams, Willes and Keating, JJ., spoke of it as "deterioration," and those learned Judges as well as Byles, J., held that in respect of such fall, the same being the direct and natural result of the delay, the carrier was liable even in the absence of notice of the purpose for which the article was sent. Clearly, therefore, in the case before us if the plaintiff had alleged and proved that, owing to the loss of the special opportunity for sale of which he wished to take advantage, the cloth had fallen in value compared to what he could have got for it had he been able to dispose of it at Karamadai as he intended, the plaintiff would have been entitled to a finding that there was a "deterioration" within the meaning of Section 72, and that the condition relied on as operating to limit the responsibility of the defendants in respect of such deterioration is void, inasmuch as the contract is not shown to have complied with the provision contained in

(1) 30 L.J.C.P. 232.

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Clause (*b*) of the section. But the plaintiff did not allege and prove that there was any deterioration as just explained. Section 72 does not, therefore, apply to the case, and it follows that the condition in question precludes the plaintiff from claiming the damages awarded to him by the District Munsif, since they are not due to any deterioration of the articles consigned. I should add that there was another objection, which the District Munsif overlooked, to those damages being allowed. They consist, as will be seen from what has already been stated, of the trainage for the plaintiff and his assistant from Erode to Karamadai and back, rent paid at Karamadai for the shop engaged by the plaintiff for doing his work as a tailor and food expenses for the plaintiff and his assistant during the time they were waiting at Karamadai for the arrival of the articles. It is scarcely necessary to point out that none of these expenses was the proximate and direct consequence of the delay in the delivery of the articles and were therefore not awardable as natural damages (see *Woodger* v. *Great Western Railway Company* (1) and *Gee* v. *Lancashire and Yorkshire Rail. Co.* (2)) as the difference between the price which could have been obtained at the festival and that on the date when the cloth was returned to the plaintiff [177] would have been (*Wilson* v. *Lancashire and Yorkshire Rail. Co.* (3), already cited. No doubt had the plaintiff caused intimation to be given to the defendants when the articles were entrusted to them that he wanted them for sale or use at the festival, it may be that the items allowed by the District Munsif would be awardable as damages within the *contemplation* of the parties. But, as already stated, the defendants were not informed, when they undertook to carry the goods, that these were required by the plaintiff at the specific time at which and for the specific purpose for which he wanted them at Karamadai. The items allowed by the District Munsif were therefore too remote and ought not to have been decreed.

For all the reasons stated above I would set aside the decree of the District Munsif and dismiss the suit, but in the circumstances without costs.

BENSON, J.—The question for our decision is how far the Railway Company is liable for damages said to have been caused to the plaintiff by the Company's failure to deliver certain goods to the plaintiff within a reasonable time after they were entrusted to the Company to be carried from Erode to Karamadai. It is admitted that the Railway Company had no notice that the goods were required to be delivered within a fixed time for any special reason. Apart from any special contract, the responsibility of a Railway Company for the loss, destruction or deterioration of goods is declared by Section 72 of the Railways Act (IX of 1890) to be that of a bailee as defined in Sections 151, 152 and 161 of the Indian Contract Act, and the last section enacts that "if, by the fault of the bailee, the goods "are not returned, delivered, or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods "from that time." In the present case there was no loss or destruction of the goods—nor was there any change in the absolute condition of the goods but the word "deterioration" is wide enough to cover a falling off in the value of the goods due to their not having been delivered in time to enable the plaintiff to take advantage of the special market which would have been available during the festival at Karamadai if they had been delivered in due time. In other words, the plaintiff might have claimed

(1) L.R. 2 C.P. 318. (2) 30 L.J. Exch. 11. (3) 30 L.J. C.P. 232.

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as damages the difference between the ordinary value of the goods at Karamadai and the special value which they would have had, if they had been delivered to [178] him at the time contemplated so as to be available for the special market then existing at Karamadai (*Wilson* v. *Lancashire and Yorkshire Rail Co.* (1) and illustration (*q*) to Section 73 of the Indian Contract Act, which illustration appears to be based on the English case). The plaintiff, however, did not allege or prove any such "deterioration," though there was a vague claim and vague evidence as to "loss of profit" owing to delay in delivery. It was, however, distinctly held in the above case, and illustration (*q*) to Section 73 of the Contract Act distinctly shows that the plaintiff could not in such a case recover any damages for loss of profit. If "deterioration" in the sense above stated had been proved, the Railway Company would not have been protected by the special contract onthe back of the forwarding note to the effect that the Company is not liable "for any loss of, or damage to, any goods "whatever by reason of accidental or unavoidable delays in transit or other- "wise," since the contract does not exclude "deterioration" in the above sense, but only loss of, or damage to, the goods unless indeed the words "damage to the goods" can be held to include "deterioration" due to extrinsic causes. Even if they could be so held (and I think it would be a strain on the language to do so), there is still the objection that it is not shown that the contract was in a form approved by the Governor-General in Council as required by Section 72 of the Railways Act, and it may well be doubted whether sanction would have been given for so unreasonable a contract. For all these reasons the District Munsif was, I think right in disallowing the plaintiff's claim for loss of profits, but I think he was wrong in allowing the plaintiff the rail fare of himself and his assistant from Erode to Karamadai and back, and the cost of their food and lodging at Karamadai. Such damages could not have been in the contemplation of the parties when they made the contract, nor can they be said to have naturally arisen in the usual course of things from the breach, since the Railway Company had no notice of the reason why the things were being sent to Karamadai, or of the arrangements which the plaintiff was making to utilise them there. In other words, these damages are too remote and do not fall within the purview of Section 73 of the Contract Act. I agree, therefore, in holding that the decree must be set aside and the suit dismissed, but in all the circumstances without costs.

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(1) 30 L.J. C.P. 232.

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## [179] APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Shephard and Mr. Justice Davies.*

SESHADRI AYYANGAR (*Plaintiff*), *Appellant v.* NATARAJA AYYAR AND OTHERS (*Defendants and supplemental Defendants*), *Respondents.** [25th, 26th, 27th August, 8th, 9th September and 8th October 1897 and 31st January and 1st, 2nd and 24th February 1898.]

*Religious Endowments Act—Act XX of* 1863, *Sections* 3, 4, 7, 11, 14—*Suspension and dismissal of trustee of a temple—Powers of temple committee—Civil Procedure Code—Act XIV of* 1882, *Section* 575—*Appeal referred owing to a difference of opinion on a point of law.*

The plaintiff was appointed to the office of trustee of a Hindu temple under Religious Endowments Act, 1863, Section 3, by the temple committee consituted under that Act. Subsequently the committee, having received certain complaints against him, suspended him from office pending enquiry without calling on him for an explanation. They alleged as the grounds of his suspension that he had caused loss of property and money to the temple and that he had conducted things in the temple contrary to custom so as to cause a disturbance of the peace. The trustee refused to acquiesce in the order of suspension and to give up certain records, &c., which he was by that order required to deliver and denied the authority of the committee as asserted by them. Shortly afterwards the committee dismissed him. The plaintiff denying that his suspension and dismissal were legal, brought two suits against the members of the committee, the first for damages for the suspension, and the second for an injunction to restrain the defendants from interfering with his discharge of his duties as trustee. Both of these suits were dismissed and the plaintiff preferred appeals to the High Court.

In the appeal relating to the claim for an injunction it was found that no misconduct had been proved against the plaintiff previous to the order of suspension :

*Held*, by SHEPHARD and DAVIES, JJ., that a trustee in the position of the plaintiff cannot be dismissed from office except for good cause shown, and that his conduct subsequent to the order of suspension did not amount to such good cause.

In the appeal relating to damages :

*Held*, by SHEPHARD, J., that the order of suspension was illegal and that under the circumstances the plaintiff was entitled to substantial damages.

*Held*, by DAVIES, J. (finding that the committee had proceeded in the *bona fide* belief that they were acting for the good of the temple in suspending the plaintiff pending inquiry), that the order of suspension was not illegal and that the suit was rightly dismissed.

[180] Owing to the difference of opinion between the two Judges the last mentioned appeal was referred to the Chief Justice under Civil Procedure Code, Section 575, and was heard by him sitting with the two other Judges :

*Held*, that the whole appeal was open for argument and not only the point of law on which the Judges had differed in opinion.

*Held*, by COLLINS, C.J., and SHEPHARD, J. (DAVIES, J., *diss.*), that the order of suspension was illegal and that the plaintiff was entitled to substantial damages.

*Per* COLLINS, C.J.—The power of suspension by the committee, is, in my judgment, the same as the power of dismissal. The committee, having made due inquiry and having called on the trustee for an explanation, may suspend for good and sufficient cause, but not otherwise.

[F., 29 M. 524=16 M.L.J. 435=1 M.L.T. 127 ; R., 30 B. 508=8 Bom. L.R. 407 ; 40 C. 323 (334)=17 C.L.J. 183=16 Ind. Cas. 908 ; 35 M. 631 (633)=10 Ind. Cas. 518 (520)=21 M.L.J. 580=10 M.L.T. 14 ; 6 Bom. L.R. 131 (191) ; 6 Bom.

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* Appeals Nos. 22 and 23 of 1896.

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L.R. 230 (232); 14 Bur. L R. 59 ; 14 Ind. Cas. 520 = 23 M.L.J. 278 (281) = 12 M.L.T. 155 ; 24 M.L.J. 428 (440).]

APPEAL against the decree of D. Broadfoot, Acting District Judge of Trichinopoly, in original suits Nos. 10 of 1893 and 26 of 1895.

In these suits which were tried together, the plaintiff was one of the trustees of the Srirangam pagoda and the defendants were the members of the temple committee constituted under the Religious Endowments Act, 1863. The fact of his appointment was communicated to the plaintiff by a document filed as Exhibit A which was in the following terms:—" This is to inform you that as you have been appointed to the office of "permanent manager of Srirangam, &c., which is vacant, you shall take "charge of the said office, and discharge the duties diligently and honestly, "submit to the committee the accounts that are due, as early as possible, "and recover immediately the losses caused to the devastanam by the "former trustees and the other present trustees and report about it." The plaintiff having incurred the displeasure of the majority of the committee, they delivered to him the order suspending him from office, and he sent the reply quoted below at pp. 216, 217. He was not called upon for any explanation and on the 25th February 1893, they sent to him a yadast dismissing him, which was filed in the suit as Exhibit R, and was in the following terms:—" Whereas in accordance with the "proceedings passed by the members in a meeting held on the 19th "instant, you have been dismissed from the office of permanent manager "of Srirangam devastanam, and Kasturiranga Ayyangar *alias* Rangasami Ayyangar of Kovalakudi, residing at Srirangam, appointed "as permanent manager in your stead, you are directed to transmit "at once to manager T. Ratna Mudaliar Avargal, the said Rangasami "Ayyangar Avargal, and Sri Vedaviyasa Alasinga Bhuttar Avargal "the present rotation manager, all records and proceedings connected "with the Srirangam devastanam that are with you, the [181] "key "of the cash chest, the peon's silver badge, and all other things of the "temple that are with you, and you are informed that if any loss "either of property or of ready money had been caused by you to the "devastanam during the time that you were employed as manager, the "same shall have to be made good by you." In the first of these cases, the plaintiff sued for damages alleging that the action of the committee in suspending him was *ultra vires* and illegal, and in the second he sought a declaration that the order of dismissal was invalid and an injunction to restrain the defendants from interfering with or obstructing the discharge by the plaintiff of his duties as trustee. The District Judge dismissed both the suits, being of opinion that the plaintiff had been guilty of grossly insubordinate conduct which justified his dismissal, and that the order of suspension was also legal.

The plaintiff preferred these appeals.

The Acting Advocate-General (Hon'ble *V. Bhashyam Ayyangar*) and *Narayana Ayyangar*, for appellant.

*Sankaran Nayar*, for respondents Nos. 1 and 2.

These appeals came on for hearing before SHEPHARD and DAVIES, JJ., who delivered the following

## JUDGMENTS (OF THE DIVISIONAL BENCH).

SHEPHARD, J.—These are appeals by the plaintiff against the decrees in two suits brought by him against the same parties, being the members

of the temple committee constituted under the Act of 1863. It seemed to us convenient to hear first the appeal in which the question of the plaintiff's dismissal from the office of trustee arose, and I will accordingly deal with that question first and afterwards with the question arising in the suit in which damages are claimed.

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The plaintiff was appointed a trustee of the Srirangam pagoda on the 1st May 1892, and he assumed office on the 15th of the same month. On the 25th February 1893 a notice was addressed to him signed by three of the defendants—Nataraja Ayyar, Krishna Ayyangar, and Ramasami Chetti,—intimating to him that he was dismissed from the office of trustee and requiring him accordingly to surrender to a person named all the temple property in his possession. The Advocate-General, who appeared for the plaintiff-appellant, did not contend that it was beyond the power of the committee to dismiss one of the trustees appointed by them, but argued that no just cause was shown for the dismissal of the plaintiff. In the Court below numerous charges were framed **[182]** against the plaintiff and they are dealt with seriatim by the District Judge, with the result of a judgment of acquittal in the appellant's favour except as to the last or seventh charge. We have considered the evidence as to the other charges and agree in the conclusion at which the Judge arrived. There remains only the seventh charge on the strength of which the Judge has considered the order of dismissal to have been warranted. The judgment is not very explicit on the point, but the finding amounts to this, that the plaintiff was, in respect of his conduct subsequent to an order passed by the committee on the 29th December 1892, grossly insubordinate to the committee and that their final order of dismissal was accordingly right and proper. The order of the 29th December begins by stating that it is necessary that the plaintiff should be suspended from the duties of manager pending the inquiry into certain petitions, and after other recitals ends as follows:—" You shall cease to do the devastanam duties " from the date of receipt of this yadast. Further, you shall deliver charge " of all proceedings and records connected with the devastanam, that are " with you to T. Ratna Mudaliar Avargal, who is another manager, and " report (that you have done so). You will be informed of the time when " the inquiry into the petitions is to be commenced."

This order is signed by the same three persons who signed the subsequent order of the 25th February. The plaintiff's reply is contained in a letter of the 10th January, in which he questions the authority of the committee to pass such an order regarding himself and asks for copies of all papers. The order of the 29th December is followed up by a letter from Ratna Mudali and another desiring him to forward to them the records of the devastanam, and again by a further letter from the same persons on the 21st January. To these two letters the plaintiff sends an answer, dated the 1st of February, in which he plainly gives his opinion that the committee were not justified in making their order of the 29th December.

On these three letters, that is to say, the letter to the committee and the two other letters, and the conduct of the plaintiff evidenced thereby, we are asked to find that a charge warranting the plaintiff's dismissal has been substantiated. We were referred to no other evidence in this connection. Undoubtedly the plaintiff denied the authority of the committee as asserted by them. As a **[183]** matter of fact, however, he did not after the 29th December take part in the festival which was then in course of celebration. The Advocate-General's argument on behalf of the

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appellant was directed to showing that the plaintiff was within his rights in resisting the attempt of the committee to displace him from his office, and that the action of the committee was irregular in respect of the omission to allow the plaintiff an opportunity of explaining his conduct. The relations of the committee to the trustees appointed have to be determined by reference to the Act of 1863, taken with the R gulation of 1817. There is very little authority bearing on the question of the powers possessed by the committee over the trustees. The seventh section of the Act provides for the appointment of committees "to take the place and "to exercise the powers of the Board of Revenue and the local agents under "the Regulation hereby repealed." On the other hand, Section 13 imposes on the trustees certain duties in the matter of accounts of their receipts and disbursements. The same section directs the committee to require the production of such accounts periodically. The powers of the Board of Revenue, so far as regards the matter in hand, are declared in the second and third sections of the Regulation. The 2nd section says: "The general "superintendence of all endowments in land or money granted for the sup-"port of mosques, Hindu temples or colleges . . . . is hereby vested "in the Board of Revenue." The 3rd section is as follows:—"It shall be "the duty of the Board of Revenue to take such measures as may be "necessary to ensure that all endowments made for the maintenance of "establishments of the description abovementioned are duly appropriated "to the purpose for which they were destined by the Government or the "individuals by whom such endowments were made." As was observed in *Venkatesa Nayudu* v. *Shri Shatagopa Swami* (1) "the scope of the Regu-"lation is the prevention of the misapplication of endowments and all "its provisions are to be read with reference to that purpose." According to the decision in *Chinna Rangaiyyangar* v. *Subbraya Mudali* (2), it is within the power of the committee, as it was within that of the Board, to deprive a trustee of his office—subject, however, to the right of thetrustee, to have the grounds of deprivation examined and adjudicated upon by a Court of justice. If the result of the examination [184] is to show that the trustee ought not to have been removed from his office, the act of the committee in removing him and appointing another in his stead goes for nothing and no order of re-instatement is required. So qualified, the proposition that the committee may dismiss a defaulting trustee amounts to very little. It amounts to no more than saying that their action in resolving on his dismissal and in procuring by peaceable means the substitution in his place of a new trustee is not illegal. It does not follow, as the District Judge seems to think and as was argued before us, that the committee is at liberty to take other measures, such as the Government or any other employer may take against its servants. The notion that the committee may exercise disciplinary powers over trustees appears to me alike unsupported by the provisions of the Act, and inconsistent with the position of a trustee having property vested in him and charged with the gratuitous performance of important public duties. His position is not that of a servant of the committee. He has what may be called a freehold in his office, and except for good cause shown he cannot be removed from it. According to the respondents' contention a trustee can be removed by the committee not only for proved misconduct on his part, but also on a mere allegation of misconduct and for the purpose of inquiry into it. This contention is certainly not supported by the case cited.

(1) 7 M.H.C.R. 77 (81). (2) 3 M.H.C.R. 334.

By way of illustration I may put the case of the member of a club whose conduct is impugned and who under the rules of the club is liable to be expelled by a vote of the members. If the contention of the respondents is sound and the provision for expulsion involves the lesser penalty of suspension, it must follow that before any inquiry has taken place and in anticipation of the final vote of the members the incriminated member may be excluded from the club and from any enjoyment of the advantages which it offers. Such a proposition could not for a moment be accepted. Perhaps a better illustration is that suggested by the case cited in argument of the Municipal Commissioner deprived of his office by the Governer-in-Council (*Vijaya Ragava* v. *Secretary of State for India* (1)). In that case the Act, under which the Government purported to proceed, provided for the removal of any Commissioner for misconduct or neglect of duty. It was held that this provision **[185]** did not make the Government the Judges on a charge of misconduct, but merely justified the removal of a Commissioner as to whose misconduct they could satisfy the Court. The security of tenure, which according to that decision the Commissioner had under the Act would have been entirely defeated, had it been held that the Government had by implication a power to remove him temporarily, not an account of proved misconduct, but for the purpose of inquiry into suspected misconduct. I think that the Advocate-General was right in saying that a so-called suspension is in point of law not distinguishable from a deprivation. A suspension during inquiry is indefinite in point of duration. There is no certainty that the inquiry will be concluded before the life of the subject of it is terminated. It might possibly be convenient that the committee should possess the powers which the respondents arrogated to themselves, but if the Legislature had intended to give them such powers, surely some provision would have been made for the discharge of the duties of the suspended trustee, for relieving him of responsibility for acts done during the period of his suspension, and generally for the preservation of the trust property during that period. It is clear that the committee during that period have no right to assume the charge of the property (*Ponduranga* v. *Nagappa* (2)), and no provision is made in the Act for the appointment of a temporary manager. Great difficulties would thus arise in the case of an endowment managed by a single trustee if the respondents' contention were adopted. In the absence of any provision for the suspension of a trustee from the ministration of his office, I am of opinion that the only course which the committee can adopt in cases of necessity is to file a suit and apply for the appointment of a Receiver. Had they done so in the present case and instituted a suit on the 29th December, whatever might have been the fate of the application for a Receiver, it is clear that the suit must have been dismissed. The committee cannot be in a better position because they attempted to take the law into their own hands and have been met by resistance on the part of the trustee. Being of opinion that the plaintiff's refusal to acquiesce in the order was lawful and not a neglect of duty or misfeasance on his part, I hold that the dismissal consequent on that refusal was not warranted in law.

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**[186]** As to the manner in which the plaintiff expressed himself, if that is material, I cannot see that it was intended to be so insulting or defiant as Mr. Sankaran Nayar would have us believe. In their own proceedings with regard to his communication the three committee men

(1) 7 M. 466.

(2) 12 M. 366.

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speak of the plaintiff as labouring under a mistaken notion as to the powers of the committee. In my view the mistake was on their side rather than on his, and the requests which he made in his answer of the 9th January were perfectly reasonable. What he asked for was particulars of the complaint made against him, and he was clearly entitled to them and to an opportunity of explaining his conduct before any further action was taken against him. It is not pretended that any such thing was done. The defendant, Nataraja Ayyar, who seems to have been the leading spirit on the committee, says that no inquiry was made into the plaintiff's case, that they dismissed him after his insolent letter, and that no notice was sent to him to attend and furnish any explanation.

It is hardly necessary in my view to consider how this conduct on the part of the committee affects the merits of the case. Seeing that the Court may, if the evidence before it justifies dismissal, direct the removal of a trustee whether or not there has been any previous resolution to that effect passed by the committee, I am not sure that the omission to give the accused trustee opportunity to explain himself is material.

I base my judgment on the ground that the order of the 29th December was one which the trustee was not bound to obey, and that therefore there was no misfeasance or neglect of duty within the meaning of the Act. I should also be prepared to hold that, even if the mistake was on the side of the appellant and not on the side of the committee, it was an honest and excusable mistake on account of which in the interests of the pagoda it was not required that the appellant should be dismissed from office.

Disposing first of appeal No. 23, I think the decree of the District Judge should be reversed, and that the plaintiff should have a decree in the terms of his plaint and also costs in this Court and below.

Coming to the other appeal in which damages are claimed, I have in my view of the law no other question to consider than that of the amount of damages. In this suit which was filed before the final order of dismissal was passed, the plaintiff claims [187] an injunction and damages on account of the order of the committee passed on the 29th December. On the allegations made in the plaint I apprehend there can be no doubt that the appellant is entitled to some damages. The principal allegation is that the order complained of was illegal. As to that I have already expressed my opinion. But it is also alleged and was argued before us as a ground for awarding substantial damages that the order was made without reasonable or probable cause, and that some of the defendants were in making it acutated by feelings of personal spite against the appellant. It becomes, therefore, necessary to consider the circumstances which led up to the making of the order and the relation of the parties before the 29th December.

The plaintiff was, as I have said, appointed trustee on the 1st May 1892 (Exhibit A), and he took charge of the office a few days afterwards. Nataraja Ayyar was not a party to the appointment, but he admits that he knew that the plaintiff was applying for the office and that he knew of the appointment a few days afterwards. He admits also that he did not object to the appointment when it was first mooted. The first occasion when he openly took exception to it was on the 6th June, which is the date of a memorandum stating his objections to the removal of the defendant,

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Krishna Ayyangar, from the office and the substitution in his place of the plaintiff. There is a suspicious delay about the making of the protest which is not accounted for by Nataraja. It appears that this Krishna Ayyangar had previously held the appointment and resigned it on the 31st May 1891, in consequence of complaints made against him. Subsequently, on the 16th April 1892, he was re-appointed, but his appointment was cancelled on the 29th of the same month and at the same time it was resolved to appoint the plaintiff. Nothing appears to have been done by the defendant Nataraja by way of following up his protest of 6th June. About the time of the plaintiff's appointment two persons—Dorasami and Ramasami—were appointed trustees of another temple, the Lalgudi temple, within the defendants' circle. In this matter there seems to have been a difference of opinion between Nataraja and his fellow committee-man Vasudeva, as there was in regard to the appointment of the plaintiff. Vasudeva says Nataraja urged him to join in the removal of these two trustees but that he refused. I think there can be no doubt that this is true, for Vasudeva's evidence is supported by the minutes written by him and Nataraja [188] in July 1892, and it is not contradicted except in a very general way by Nataraja. It appears from these minutes that the dispute had begun before the 6th of June. The end of it was that the two Lalgudi trustees were dismissed on the very day on which the plaintiff was dismissed. On the 27th June 1892 the Chetti, who had been a party to the plaintiff's appointment, died, and so till the 20th October the committee consisted of two persons only, *viz.*, the defendants, Nataraja and Vasudeva. In the interval and indeed for some time afterwards there can be no doubt that the plaintiff's position as trustee was unquestioned. As late as the 19th November 1892 there is a yadast signed by all five members of the committee designating the plaintiff and his colligues as managers of the temple and entitled to receive the Mohini. All this time, however, while in public the plaintiff was duly recognized, there can be little doubt that Nataraja privately entertained the idea of ousting him from office. He was only waiting for a convenient opportunity. After the instalment of the new committee, the first measure adopted as regards the plaintiff appears to have been the writing of a minute by the new committee-man Krishna Ayyangar. This minute, dated the 21st December 1892, deals with the case of the Lalgudi trustees, and also with certain petitions in which complaints had been made against the plaintiff. The minute concludes with the recommendation that the plaintiff should be immediately suspended, the main ground being that he is a Vadagalai, whereas the temple is a Tengalai one, and that disturbances are likely to take place during the festival. The defendant Ramasami agrees with this minute. Two days later, on the 26th, the defendant Nataraja expresses his concurrence. In his minute for the first time for more than six months he revives the objections raised by him in his memorandum of 6th June to the plaintiff's appointment. The fourth member of the committee—Krishnamachari—demurs to the recommendation of Krishna Ayyangar and advises that, before any order is passed, the plaintiff should be asked to explain the matters alleged against him. His minute is dated the 27th December. What was done between that date and the 29th when the order of suspension was issued, does not clearly appear. All we know is that the fifth member Vasudeva says he knew nothing of the minutes of his colleagues, nor of the order until after the date when the latter was issued. I think we may fairly assume that the three persons who signed the order were aware that Krishnamachari

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objected to it [189] and advised delay and that the other defendant Vasudeva had never been consulted. I think we must also assume that the two defendants (for the defendant Ramasami Chetti is dead) approved of the terms in which the order was drawn up. Now, what are the matters charged against the plaintiff in this order? There are four heads. There is first the charge that he obtained the office of trustee by improper means—that is the matter on which, as already mentioned, Nataraja's minute dwells. Then there is the charge or causing loss of property and money to the devastanam. Next, there is the charge of conducting temple affairs so as to cause riots between Tengalais and Vadagalais, and lastly there is the charge with reference to what is called the Tidal festival. I have already said that these charges, which are included in those insisted upon by the respondents at the hearing, have not been established by the evidence. We must take it that they are groundless charges, and consider whether Nataraja and Krishna Ayyangar took reasonable pains to ascertain, if they were true or whether they knew them to be groundless. The question was much discussed whether the matters mentioned in the order relating to the conduct of the festival were within the scope of the committee's authority, the committee being primarily concerned to see only to the preservation and proper disposition of the temple property. In my opinion, having regard to the language of the Act, the committee have no business to interfere in the internal management of the temple or in mere matters of ritual or ceremonial. Their interference with the trustee is unauthorized and improper save so far as it can be justified as necessary in discharge of the secular duties which the Act imposes on the committee. In considering the conduct of the committee, however, with reference to damages, I do not think this ought to be taken into account. I give the committee credit for being honestly mistaken with regard to the scope of their duties.

The materials which they had before them when they wrote their condemnatory minutes were certain petitions, dated on various days in September, October and December 1892. The fact that not a single signatory of these petitions has been called to vouch for the statements made therein is suggestive of their character when it is remembered that the charges were not abandoned at the trial. The defendants have placed themselves in a dilemma. Either they did not examine the signatories, or they did examine them and found them wanting. Nataraja says that he did [190] examine them, but as it appears that any examination which took place was after the 29th December, this fact is irrelevant except as throwing light on his subsequent conduct. Obviously, facts which came to the knowledge of the defendants after that date cannot be taken into account in considering what was the mental condition of the defendants on or before that date.

I will take first the charge regarding loss of property which, in my opinion, is the only charge on which the committee were entitled to take any action. Assuming that this charge refers to the gold dust alleged to have been improperly disposed of, I observe that it is not mentioned in the lengthy minutes written by Nataraja and Krishna Ayyangar before the issuing of the order. It appears to be founded on a statement made in a petition, dated the 14th November 1892. Is it possible to believe that men of business and some education like the two defendants selected by a District Judge as competent to discharge important duties could have given credit to the mere statements of the petitioners, untested by examination and uncorroborated? If they had attached any weight to the

charge, they surely would have dwelt on it in their minutes. It was urged on behalf of the defendants that the apprehension of a disturbance during the festival compelled them to take immediate action, and it is pointed out that Ramasami Chetti, against whom no personal malice is charged, acquiesced in their view. Here again the grounds of the alleged apprehension are to be looked for in the vague statements made in the petitions. There had been no disturbance during the first ten days of the Ekadasi feast. Ratna Mudali, one of the plaintiff's colleagues who seems to be fairly impartial, was equally responsible with them for the conduct of the festival. He does not appear to have apprehended any trouble and clearly the committee-man, who refused to join in the order of suspension, did not see any reason for immediate action. When we look at the dates, the date of Nataraja's protest, 6th June, the date of the October minute, the dates of the petitions, the date of the filling up of the committee, the 28th October, and the date of the order, it is difficult to avoid drawing inferences against the defendants. One inference I have already mentioned, *viz.*, that the idea of ousting the plaintiff from office was secretly entertained by the defendant Nataraja throughout from the 6th June. Another inference I draw is that, whatever may have been the apprehension of the defendants, there was no sort of urgency and **[191]** that there was a determination to deprive the plaintiff of the honours which he would have enjoyed during the last ten days of the festival. Possibly also the absence of the fifth member may have had something to do with the selection of the date. Before leaving the four charges I must say a word about the first relating to the alleged invalidity of the plaintiff's appointment. It is obvious that, if the appointment was invalid, that could be no ground for the summary action of the 29th December. But I think the prominence which is given to this matter throws considerable light on the conduct of the defendant Nataraja. Here is a member of the committee, who for months has acquiesced in the appointment of the plaintiff as trustee, and also, even as late as the 19th November, publicly recognizes him as holder of the office, making use of facts well known to him all the time as a ground for depriving him of his office. I think there is good reason for saying that the real motive which actuated Nataraja was resentment against Vasudeva for having procured the appointment of his relative, the plaintiff, coupled, perhaps, with a sectarian aversion to them both as Vadagalais. One has only to read the petitions to see that the real gist of the complaint against the plaintiff was that he was a Vadagalai, and therefore out of place in a temple which, according to the petitioners, is a Tengalai temple. This is the complaint which is taken up by Nataraja in his first minute on the petition, 4th October 1892. The view expressed there is that as long as plaintiff and Ratna Mudali are trustees and Vasudeva is on the committee, there is no hope of things being conducted properly in the temple. The same line is adopted by Krishna Ayyangar and the other committee-man. Krishna Ayyangar had in addition his own private quarrel with the plaintiff, for, as already mentioned, he had been superseded by him. Further, it is quite possible that bad feeling may have been created between them by the incident connected with municipal affairs in which they came into collision. It is worthy of note that Krishna Ayyangar has allowed all the evidence against him to go uncontradicted and refrained from going into the box. All that can be expected of the plaintiff is that on the one hand he should show there were no facts before the defendants on which fair and reasonable men with a due sense of their responsibility would take action

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against a trustee, and that on the other hand there were circumstances in the previous relations between himself and the [192] defendants to account for the action of the latter. I think the plaintiff has shown that the rivalry between Nataraja and Vasudeva counted for something among the motives of the former's conduct. If, however, I am wrong in supposing there was any personal feeling on the part of Nataraja or Krishna Ayyangar, I am not sure that it makes much difference, because then the sectarian motive is the only one that remains, and the conduct of the defendants if so explained would hardly be less reprehensible than if it had been actuated by motives of personal dislike.

To sum up, I start with the proposition that, inasmuch as the order of the 29th was illegal, the plaintiff is anyhow entitled to some damages. I find that on that date the defendants had no materials before them on which a reasonable man of the world would have taken any decisive action, and that the defendants took no steps to test the accuracy of the statements made to them and in spite of the remonstrance of their colleague gave no opportunity to the plaintiff to explain matters. They required no evidence and listened to no defence. I observe that the plaintiff only and not his fellow-trustee, who with regard to some of the matters was equally responsible was selected for condemnation. I find in the history of the previous relations of the parties ample grounds for believing that hostile feelings were entertained by the defendants towards the plaintiff, and I observe that the charges against the plaintiff were persisted in to the end, although the defendants must have known that they could not substantiate them. I think there is no doubt that one of the main grounds for the proceedings of the defendants was the fact that the plaintiff was a member of the Vadagalai sect. On these findings I am of opinion that the plaintiff is entitled to substantial damages. If the action had been simply for defamation, the plaintiff, having regard to the innendo which the allegations in the order of the 29th fairly bear, might justly have claimed substantial damages. The first two charges imputing to the plaintiff improper conduct in connection with his appointment and dishonest conduct in regard to the temple property are distinctly defamatory. But the defendants have done more than defame the plaintiff. They have also done their utmost to deprive him of an important office of trust and at a critical moment to rob him of the honours attaching to it. Taking all the circumstances into consideration I would award the plaintiff Rs. 1,000 by way of damages. Costs will of course follow.

[193] Davies, J.—The plaintiff was appointed to the office of permanent manager of the Srirangam devastanam on the 1st of May 1892 by two out of the three then existing members of the temple committee of the Trichinopoly taluk. The present fifth defendant and one Thota Venkatachalasami Chetti, now deceased, were the two members who appointed the plaintiff. The other member of the committee was the first defendant who objected to the appointment on the ground apparently that the second defendant was a more suitable person to hold it than the plaintiff, who was not only a cousin of the fifth defendant who appointed him, but who belonged to the Vadagalai sect of the Vishnuvites, while the temple he was managing was a Tengalai temple. The first defendant's protest was, however, in vain, as he was in the minority. The member Thota Venkatachalasami Chetti died soon afterwards, and on the 21st October 1892 his vacancy and two other vacancies that had existed for some time

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were filled up by the appointment to the committee of the second defendant, the ex-manager of the temple, to which plaintiff was appointed, and of the third and fourth defendants. Certain complaints having reached the committee, now composed of five members, of mismanagement by the plaintiff, a majority of three members out of five, *i.e.*, the first, second and third defendants, resolved on suspending him pending enquiry into his conduct. This they did on the 29th of December 1892. The plaintiff demurred to the action of the committee, and though, it appears, he did not continue to conduct the services in the temple, he refused to deliver up the papers and the keys of the cash chest that he was in possession of as manager. Challenging the right of the committee to suspend him as they had done, he filed the first suit the subject of Appeal No. 22 against the members of the committee for wrongful suspension and claiming damages therefor. In consequence of these proceedings on his part the three same members who had suspended him dismissed him from his office on the 25th of February 1893. The plaintiff then brought a second suit, the subject of Appeal No. 23, to declare his dismissal void. But in this suit he claims no damages. The District Judge has dismissed both the suits on the ground that there was nothing irregular in the order temporarily suspending the plaintiff and that his dismissal was justified by his insubordination to the committee. The appeals are based on the grounds that the suspension by the committee of the plaintiff pending enquiry into his conduct [194] was illegal as being *ultra vires*, and that both as regards the suspension and the dismissal there was no good and sufficient cause. There is no question here whether the plaintiff was a trustee, manager or superintendent under Section 3 of the Act XX of 1863 or Section 4 of that Act. He was admittedly a nominee of the committee, and therefore was in the position of a trustee under Section 3 and not Section 4 of the Act. It was urged on his behalf, however, that the committee had no control over his management of the pagoda and that they had no power to suspend him pending an enquiry into his alleged misconduct. It was not contended that the committee could not dismiss him outright for proved misconduct; but excepting this, it was claimed for him that he was pretty much in the independent position of an hereditary trustee under Section 4 of the Act. The first important question then that arises for consideration is what are the powers of the temple committee,(*a*) in regard to the control they can exercise in the management of the temples in which the nomination of the trustee is vested in them under Section 3, and(*b*) over the individual appointed to the office.

The learned Acting Advocate-General, who appeared for the plaintiff, would have it that the powers of the committee in regard to the first matter are limited to the power conferred in Section 13 of the Act to call for accounts, and that the committee have no voice in the internal management of the temple or still less in matters of ritual therein. If that be the case it is hard to understand why the members of the committee must, according to Section 8 of the Act, be persons professing the religion for the purpose of which the temple is maintained, or, to use the words of the Government Order, Exhibit KK, of 1841 'individuals professing the same faith'; because if their powers are limited to the examination and audit of the accounts of the various temples under their control, the work could be as well if not better done by the Accountant-General and his staff without regard to their creed. The effect of upholding the view put forward would be to reduce the temple committee to a mere non-entity, whereas the plain object of their appointment was to invest them with

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all the powers which the Board of Revenue used to exercise. The history of the matter shows that the powers of the Board of Revenue were absolute and unlimited, being in fact their exercise of the sovereign power of Government which was conferred on [195] the Board of Revenue by the Government by Regulation VII of 1817. It is those powers which have now devolved upon the committee who by force of Section 7 of the Act XX of 1863, "were to take the place, and to exercise the powers, of the Board of Revenue and the local agents" under that Regulation. "By the passing of the Act all the powers relating to "the superintendence and management of religious establishments which "has been vested by the Regulation in the Board of Revenue and the "Collectors throughout the country, were completely determined; and "either the District Committees appointed under the Act or the trustees, "managers, or superintendents referred to in Sections 4, 5 and 6 became "entitled to the possession and management of all religious endowments, the former of all those of the class described in Section 3 and "the latter of all within the description in Section 4" (Per Scotland, C.J., in the case of *Jusagheri Gosamiar* v. *The Collector of Tanjore* (1)). Sections 2, 3 and 15 of the Regulation VII of 1817 show that it was the general superintendence of all endowments for the support of temples that was vested in the Board of Revenue, that it was the duty of the Board of Revenue to take such measures as might be necessary to ensure that all such endowments were duly appropriated to the purpose for which they were destined, and that it was the sole object of the Regulation to provide for the due appropriation of the endowments agreeably to the intent of the grantor. For the proposition that these functions were the delegated functions of Government as the sovereign power, there is the direct authority of the Privy Council in the Rameswaram pagoda case in the Ramnad Zamindari—see *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai* (2) from which I take the following extracts (pages 232 to 235):—

"It will be convenient to consider what powers the Board of Revenue "and the Collectors possessed, or *de facto* exercised in relation to religious "houses. The proceedings upon the accession of Venkatachellam, above des-"cribed, took place before Regulation VII of 1817 was passed. But it is evi-"dent that before that Regulation the British Government, by virtue of "its sovereign power, asserted, as the former rulers of the country had "done, the right to visit endowments of this kind and to prevent and [196] "redress abuses in their management. There can be little doubt "that this superintending authority was exercised by the old rulers. . . . It appears, therefore, to be highly probable that the Setupatis "in the days of their power exercised control over the pagoda, not, how-"ever, in virtue of any proprietary right of patronage, but as the rightful "or *de facto* rulers of the district. The powers they enjoyed as sovereigns, "whatever they may have been, have now passed to the British Govern-"ment. . . . That the new rulers, at an early date, exercised a con-"trolling supervision and authority over the temples very clearly appears "from a letter written in 1803 by the Board of Revenue to Mr. Hurdis, "the Collector of Madura. . . . It is abundantly clear from this letter "that long before Regulation VII of 1817 the British Government not "only assumed the power to superintend the management of the property "and affairs of the pagodas throughout the Peninsula, but exercised its

(1) 5 M.H.C.R. 334 (341). (2) 1 I.A. 209.

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"authority through the agency of the Collectors. The preamble of the "Regulation of 1817, after stating that large endowments had been granted "by former Governments as well as by the British Government and "individuals for the support of temples, and that the produce of such "endowments were in many instances misappropriated, declares it to "be 'the duty of the Government to provide that all such endowments "'be applied according to the real intent and will of the grantor.' It "then enacts that the general superintendence of all endowments should "be vested in the Board of Revenue and prescribes the duties to be per-"formed by them to prevent misappropriation of the funds. It also "authorizes the Board to appoint local agents, and declares that the Col-"lector of the district shall be *ex-officio* one of such agents. . . . [It "is thus] established that at an early date the power of superintendence "was entrusted by the Government to the Board of Revenue and the "Collectors. The Regulation, in fact, merely defined the manner in which "that power was thenceforth to be exercised." Similar observations were made by this Court in an earlier case (*Ramiengar* v. *G. Pandarasannada* (1). The learned Judges, Scotland, C.J., and Innes, J., say: "The duties "of superintendence and the proper appropriation of the endowments of "Hindu and Muhammadan temples and religious establishments, of the [197] "preservation of the structures of such temples and esablishments, "and of the management of their affairs, through trustees or managers, "were without doubt, we believe, exercised by the officers of the Local "Government indiscriminately long before the Tanjore territory and temples "were assumed by the Government, and in 1817 the general management "of all endowments of religious establishments in this Presidency, as also "the duty of seeing that the trustees or managers of such establishments "were properly qualified and duly appointed were made without exception, "a legal obligation on the Board of Revenue and their local agents by "Regulation VII of that year." The complete powers thus entrusted to the Board of Revenue were henceforth exercised by them up to the year 1841, when, according to the judgment in the case just referred to (page 59) "the Government, it appears, became in 1841 strongly influenced by "conscientious, moral and religious scruples, and considering that they "were at liberty in their executive capacity to divest themselves of the "duties and responsibilities imposed by law in connection with Hindu and "Muhammadan religious establishments, they determined that all duties "and trusts, excepting the management of lands attached thereto, should be "left finally and completely in the hands of properly qualified individuals." Exhibit KK, in the present case, of the year 1841 is evidence of the fact just stated, namely, that the Government in that year resolved to relinquish all interference with native temples both in the internal arrangements thereof and the administration of their revenues, reserving to themselves only the managements of the lands endowed. It is therefore evident that, from the year 1817 up to 1841, the Board of Revenue had the fullest control over temple affairs including even the internal arrangements of the institutions. They exercised these powers over both classes of religious establishments as distinguished now in Sections 3 and 4 of the Act XX of 1863. I quote again from the judgment in *Ramiengar* v. *G. Pandarasannada* (1): "The recitals and enactments too of Act XX of "1863 show that the two classes of temples and religious establishments "described in Sections 3 and 4, and the property belonging thereto, were,

(1) 5 M.H.C-R. 53 (57).

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"at the time of its passing, alike subject to the control of the Board "of Revenue and [198] their local agents in the performance of all the "above duties, and it was the very purpose of the Act to provide differently "for the future exercise of such duties, according as the nomination of "the trustee, manager or superintendent of each temple or religious "establishment had or had not been ascertained to be a right possessed "independently of the Government." So that the powers of the Board of Revenue under Regulation VII of 1817 which legally existed until the passing of Act XX of 1863 were continued to the temple committees formed under that Act in respect to all temples falling under Section 3, and were taken away only in regard to the temples falling under Section 4. That the Board of Revenue were deprived of some of their powers so far back as 1841 by the executive order of Government does not affect the position of the committees created under Act XX of 1863; because it is not the powers of the of Board Revenue as they existed at the time that the control of the temples was made over to the committees, that were conferred upon them, but the powers of the Board of Revenue as they existed in 1817, and what those were have, I think, been sufficiently set forth. The plaintiff's case being one falling under Section 3, he cannot possibly claim exemption from control by the committee of his management which can only be claimed by trustees coming under Section 4. No case has been cited since the passing of Act XX of 1863 in which exemption from such control has been established by a trustee appointed under Section 3 of the Act, and it is certain that it would never have been recognized. On the other hand, in the case of *Virasami* v. *Subba* (1) we find an instance of a trustee who had submitted generally to the "authority, interference and supervision" of the committee. And a contention there similar to the one in the present suit that a trustee was only liable to render an account to the committee was overruled. If any further proof were wanted as to the all-reaching control vested in Government officers before the passing of the Act XX of 1863, it is to be found in Section 22 of the Act which prohibits officers of Government from thereafter undertaking or resuming the superintendence of any endowments, or taking part in the management or appropriation thereof or appointing trustees or being in any way concerned therewith. This is a clear indication that such were the powers which the officers of Government had been previously exercising [199] and which thenceforth devolved on the temple committees. From what has been stated there cannot, I think, be a shadow of a doubt that in this case the committee were empowered to supervise and control the plaintiff in all his acts of management including the conduct of religious services. If, for instance, the plaintiff was showing favour to Vadagalai observances rather than to Tengalai, it was within the power of the committee to prevent him from doing so, this being admittedly a Tengalai temple, just as much as if it being a Vishnuvite temple he had introduced a Shivite form of worship therein, because he would have been appropriating the funds of the temple to a purpose foreign to the intention of the grant; and it is the duty of the committee to see to the due appropriation of the funds. Several complaints had reached the committee that the plaintiff was introducing Vadagalai rituals, and if that was so, it was within their power to prevent it under the general powers of control which, in my opinion, they undoubtedly possess.

(1) 6 M. 54.

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The other part of the question is, what are the powers of the committee in regard to the individual whom they have appointed to the office in case he disobeys their orders or does not submit to them as to the way in which he should conduct himself in the discharge of the duties of his office? That the committee have for just cause the power of dismissing a trustee or superintendent appointed by them under Section 3 of the Act has been laid down in *Chinna Rangaiyangar* v. *Subbraya Mudali* (1) It was there found that the Board of Revenue both in this Presidency and in Bengal had all along exercised the power, and the Court (Scotland, C. J., and Collett, J.) held that the power, though not expressly given by the Regulation, "was properly incident to the principal duties and the "responsibilities of the Board of Revenue and was impliedly given," and they further held that that power being a power properly exercised by the Board of Revenue, was a power, transferred to the committee. That decision was given in 1867 soon after the passing of the Act, and it has never been departed from. On the other hand, it has been followed and recognised in subsequent cases, notably in *Ramiengar* v. *G. Pandarasannada* (2) and *Virasami* v. *Subba* (3). Nor is it contended on behalf of the appellant (plaintiff) that he was not liable to dismissal by the [200] committee for good and sufficient cause. What is contended is that he was not liable to suspension by the committee. Suspension is no doubt a temporary removal from office as dismissal is a permanent removal therefrom. But surely it stands to reason that the greater power includes the less and that if the committee have the power to remove a trustee from office for all time, they can do so for a time. Indeed, we find wherever we look the two powers are classed together as going hand in hand. Thus, in the leading case of *Chinna Rangaiyangar* v. *Subbraya Mudali* (1) we find the Judges speaking of the authority 'to suspend or remove' as equivalent powers. In suits brought under Section 14 of Act XX of 1863 authorizing a Civil court to direct the removal of a trustee, a temporary removal or suspension has been judicially recognised by this Court as within the powers of the Civil Court in a very recent case—see *Natesa* v. *Ganapati* (4). Again, in the Madras Civil Courts Act III of 1873, the powers of suspending or removing Subordinate Judges and Munsifs and ministerial officers are clubbed together as alternative courses. So that I think there can be no doubt that where the power of removal exists in a governing body the power of suspension is necessarily included. I do not mean to say that this proposition would apply to the special case that was put of a club where a member may be expelled for misconduct. The rights and obligations of the members of a club are mutual and equal, and are subject to an express set of rules. If no provision is made in those rules for the suspension of a member pending inquiry, such a course would not be permissible, for the simple reason that the special and peculiar rules which govern the club do not permit of it. There is nothing, however, to prevent the introduction of such a rule if the members of the club so choose. The relative position, however, of the temple committee and of the plaintiff is not the same as that of the members of a club. It is not as if the trustee under Section 3 was independent of the temple committee in which case the temple committee would not have the power to dismiss him at all, just as they have not the power to dismiss a trustee under Section 4. In the words of the judgment in *Chinna*

(1) 3 M. H. C. R. 334. (2) 5 M.H. C. R. 53 (54). (3) 6 M. 54, (4) 14 M. 103.

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*Rangaiyangar* v. *Subbraya Mudali* (1) the plaintiff is an officer "amenable to their control," and as such their subordinate. It is true that in one view he is a trustee as the property of the [201] temple is vested in him and not in the committee; but in another view he is also a servant of the committee, because he is subject to their control. He holds in fact a dual character, and that is why, perhaps, the plaintiff's appointment was designated as that of "permanent manager" and not as that of trustee. If he were a trustee and nothing but a trustee, the committee could have no power in themselves to dismiss him, but would have to seek the intervention of the Courts. But the undisputed power that the committee have in themselves to dismiss him is a clear signification that he is not in the position of an ordinary trustee. If he grossly misbehaves himself, the committee in the exercise of their powers of control can admittedly dismiss him; but supposing his misconduct is not such as to warrant an outright dismissal, are the committee to be powerless to check him by any punishment short of dismissal which dismissal *ex hypothesi* could not be justified? In every view, therefore, it seems to me that the power of suspension is inherent in the power of dismissal. So that if in this case the suspension of the plaintiff had been made as a punishment, I should have no hesitation in holding that it was within the power of the committee; but in this case the suspension was not made as a punishment but was a suspension pending an inquiry into the charges of misconduct alleged against him. Now, assuming of course that the committee acted *bona fide* and believed there was a *prima facie* case made out against the plaintiff, the question is whether in such circumstances it was within the power of the committee to temporarily remove him from office pending further inquiry; that is, whether the committee could suspend him for suspected misconduct as contradistinguished from proved misconduct. The power is one which is (as is well known) exercised by Government over its own servants, and there is an instance of its having been exercised by a Collector over a trustee, *Ponduranga* v. *Nagappa* (2), where this Court took no exception to the course adopted by the Collector. The following is the text:—"It appears, however, that in 1834 the Collector suspended him from office for neglect of duty on the ground that his "conduct was open to suspicion and that in 1837 the Collector finally dismissed him from trusteeship (see Exhibits Y, Z and DD). Although it "is alleged that this dismissal was an arbitrary proceeding on the part "[202] of the Collector, there is no evidence to show that such was the "case and that the Collector passed the order otherwise than in the *bona* "*fide* discharge of his duty under Regulation VII of 1817." Viewed as a preliminary and precautionary step ancillary to the exercise of the substantive powers of suspension and dismissal, the procedure appears not only to be unobjectionable, but justifiable as being advantageous to both parties where the relation of master and servant exists. As in this case the control of the committee over the plaintiff was the control over a subordinate, the case seems parallel to the case of master and servant. I must, therefore, hold that the committee did not exceed their powers in suspending the plaintiff pending inquiry. It must be remembered that the powers of the committee are derived from the supreme or sovereign power of Government, and there can be little doubt that the Government were free to suspend a recalcitrant trustee *pro tempore* pending further action when they controlled the management of the pagodas just as they now do with

(1) 3 M.H.C.R. 334 (337). (2) 12 M. 366 (371).

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their officers. This Court itself only last year on two occasions suspended Munsifs pending an inquiry into their conduct. This was done under the Court's general power of suspension and it was not considered open to question.

Holding then that the committee were empowered to pass the orders which they did, the next and last question is whether they properly exercised those powers in regard to the plaintiff. Those powers must be exercised in a reasonable and not in an arbitrary way as laid down in the case of *Vijaya Ragava* v. *Secretary of State for India* (1). It would not be the committee's own view of what constituted misconduct that would justify their removal of the trustee, but only what would satisfy a Court of Equity that there was misconduct. On other hand, in the case of a trustee it is not always necessary to establish actual misconduct against him before he can be removed. A trustee may be removed if the Court is satisfied that the continuance of the trustee would prevent the trust being properly executed. The principle is stated by Lord Blackburn in *Letterstedt* v. *Broers* (2) as follows :— "And therefore though it should appear "that the charges of misconduct were either not made out or were greatly "exaggerated, so that the trustee was justified in resisting them and the "Court might consider them in awarding costs, yet if satisfied that "**[203]** the continuance of the trustee would prevent the trusts being "properly executed, the trustee might be removed. It must always be "borne in mind that trustees exist for the benefit of those to whom the "creator of the trust has given the trust estate." The grounds on which the majority of the committee issued their first order suspending the plaintiff are to be found in Exhibit N. They are (1) that he owed his appointment to the favour of one committee member, his cousin, the fifth defendant, and to the fear of another, the Chetti who has since died, the charge on the latter head being that the plaintiff had taken civil process out against the Chetti to intimidate him, (2) that since his appointment he had caused loss of property and money to the temple, and (3) that he had conducted things in the temple contrary to custom so as to cause a disturbance of the peace between the Tengalais and the Vadagalais, and that some of his irregular acts were disrespectful to the God. It is urged on the plaintiff's behalf that none of these grounds was a good one and that the order was actuated by personal ill-will against the plaintiff. Premising that, unlike in an order for dismissal, the grounds for suspension pending an inquiry do not need to be actually proved and that it is sufficient if they are *prima facie* grounds for action, I observe that the committee had before them several long and detailed complaints of mismanagement on the part of the plaintiff, and I must say that if they believed in the genuineness of those complaints they had ample reasons for suspending the plaintiff pending inquiry. I do not refer to the first ground which they have given in their order, because I think that that was not a proper ground for suspension, as the plaintiff had been in office for seven or eight months during which time he had been acknowledged by the committee as the manager. But in respect to the grounds (2) and (3) there were apparently genuine complaints of actual malversation and of malfeasance and nonfeasance. It is urged that, as regards the ground No. 2, the committee had no reason for believing that there had been any malversation and that as regards the ground No. 3 of general mismanagement the committee had no power of interference with

(1) 7 M. 466.

(2) L.R. 9 App. Cas. 371 at p. 386.

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the internal arrangements of the temple. It is also said that it was no part of the business of the committee to prevent a breach of the peace. However, I consider that they had a concern in both matters in the preservation of the peace and in the conduct of affairs in the [204] temple, as they certainly had in regard to the malversation, if any, of the funds. One particular fact must be borne in mind, and that is that there had been no manager of the Vadagalai sect since 1881, and that in the time of the previous Vadagalai manager there had been serious rioting. There had also been a disturbance in the temple soon after the plaintiff took charge in regard to his conduct of the Tidal festival in which the interference of the magistracy was invoked, and at the very time when the order of suspension was passed there was another important festival going on. So that the only question is, did the committee proceed in the *bona fide* belief that they were acting for the good of the temple in suspending the plaintiff when they did; for I think that a court of justice would have acted in the same way on the same materials if there was reason to believe that they were true. I agree with the District Judge in thinking that the three members of the committee who signed the order Exhibit N were not actuated by dishonest motives or personal ill-will against the plaintiff. It is not alleged that the third defendant, one of the signatories now deceased, had any personal spite against the plaintiff, and this to begin with is a very material point in favour of the *bona fides* of the order. The circumstances relied on as showing a personal animus against the plaintiff on the part of the other two committee members are not, in my opinion, sufficient to prove it. In regard to the first defendant all that is shown is that he had had a difference of opinion with the fifth defendant respecting the dismissal of the trustees of another temple, the Lalgudi temple, and it is said that in consequence of that he had threatened the fifth defendant to do harm to his cousin, the plaintiff. As it is a fact that the first defendant had protested against the appointment of the plaintiff from the outset, I do not see how any subsequent dispute between him and the fifth defendant could have been the cause of the first defendant's objection to the plaintiff. That objection was never disguised, and I think the first defendant is entitled to be credited with honesty in his objection to the plaintiff's appointment and management. It was mainly on the ground that he was a Vadagalai and therefore not fit to manage this Tengalai temple; and there was no *odium theologicum* on the first defendant's part, for he is neither a Tengalai nor Vadagalai but a Shivite. I believe, therefore, that it was on public grounds that he objected to the plaintiff's appointment [205] at first and afterwards ordered his suspension when he found that the appointment had actually led, as he thought it would, to mischievous results.

In regard to the second defendant there is the fact that he was superseded in the management of this temple by the plaintiff. So that it is possible that his feelings towards the plaintiff were not altogether amicable. But there is nothing to show that he ever evinced any hostility to the plaintiff on that ground. Though he had lost the managership of the temple he had achieved the higher position of a member of the temple committee and was probably just as content with that position as the one he had lost and which he could not recover now that he was a member of the committee. I find nothing in any of the other circumstances alleged against the second defendant as showing his personal animosity to the plaintiff, as I find the acts of the second defendant in connection with the plaintiff were acts performed by the second defendant in his official

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capacity in which no bias against the plaintiff was even shewn. It should be noticed that the fourth member of the committee did not disapprove of the action being taken by the other three members, but only held his hand, thinking that an explanation from the plaintiff should first be called for. This of itself shows that there were matters against the plaintiff calling for explanation at least.

The fifth member is the fifth defendant who, of course, did not join in the order made against his nominee and cousin. I am therefore of opinion that as respects the order of suspension the three members of the committee were well within their rights and that they acted entirely in what they thought to be the interests of the temple in suspending the plaintiff.

To come to the subsequent order of dismissal by the same three members, I am bound to find that they acted without good and sufficient cause, although I attribute no actual *mala fides* to them in so doing. By defying the committee the plaintiff frustrated and prevented them from holding an inquiry and thereby no doubt put them in a fix, which affords them some excuse. But when informing the plaintiff in Exhibit R of his dismissal they give him no reason whatever for the same. In the minute they recorded (Exhibit S) giving their reasons for dismissing the plaintiff, they state generally that it was because he denied their authority over him and refused to give up the key of the cash **[206]** chest and the records that were with him and at the same time threatened them with a suit on account of his suspension, which suit, as a matter of fact, he had already filed when they passed the order of dismissal. Now, looking to the fact that they gave the plaintiff no notice of their intention to dismiss him or why they dismissed him, and gave him no opportunity of explaining his conduct and that nothing else had occurred against him since his suspension except his refusal to submit to that order, and that in the suit that has now been tried they have failed to substantiate any of the charges laid against him excepting, perhaps, a charge of insubordination, I consider that they were not justified in dismissing him peremptorily only for contesting their authority. He appears to have done this under a *bona fide*, though mistaken, belief that the committee had no power to suspend him without previous inquiry, and I do not think that the letter of protest that he wrote (Exhibit Q) went beyond the due bounds of decorum. At any rate even after this trial, no good and sufficient cause for his dismissal has been proved, and the only ground on which the Judge considered that the dismissal was justified was his insubordination. That by itself, in the circumstances stated, was not of such a kind as to warrant his summary dismissal without his being allowed even the opportunity of an explanation. As before remarked, in order to justify the deprivation of his office there must have been such proved misconduct on the plaintiff's part as to satisfy a court of justice, or it must have been shown that it was absolutely necessary for the welfare of the temple that he should be removed. Neither of these points has been established by the defendants, and I accordingly decide that the plaintiff's dismissal was wrongful, albeit his suspension was right.

In the result the appeal No. 22 will be referred to the Chief Justice under Section 575, Code of Civil Procedure, and the appeal No. 23 will be allowed and a decree given to plaintiff in the terms of the plaint with costs throughout.

[Appeal No. 22 of 1896 relating to the appellant's suspension from office came accordingly on for hearing before the Chief Justice sitting with SHEPHARD, and DAVIES, JJ.]

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The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*) and *Narayana Ayyangar*, for appellant.

*Sankaran Nayar*, for respondents Nos. 1 and 2.

**[207]** *Bhashyam Ayyangar.*—The two questions which arise are, first, whether the defendants had the power to suspend the plaintiff, and in the second if that power existed, was there due cause for its exercise? It is true that in cases of clubs and other like associations the Court will not sit as a Court of appeal, but will only see that the proceedings have been duly held in the matter of giving notice to the person concerned and other like respects. It is otherwise in such cases as the present. The Court will form its own judgment as to the cause and ground of the dismissal, as in the case of a Municipal Commissioner under the District Municipalities Act, see *Vijaya Ragava* v. *Secretary of State for India* (1) where the plaintiff wanted to have it declared that his dismissal by Government from the office of the Municipal Commissioner was invalid and sought not restoration to office but damages. It was decided that Government could dismiss only when there was misconduct which it had to prove: the matter did not depend upon whether there had been misconduct in the opinion of Government. Now, could Government have suspended the Municipal Commissioner pending inquiry into the reports which led to his dismissal? Clearly it could not and similarly here the committee had no power to suspend the trustee. The power to dismiss does not include the power to suspend. Compare *Barton* v. *Taylor* (2). [COLLINS, C. J.:—Is there here any statutory power to dismiss or suspend?] Not in express terms. The power to dismiss comes from the old superintendence of the Board of Revenue which was subject to the Court's power to decide the question of misconduct. The Court, of course, when misconduct is proved, has the power to dismiss, but has the Court power to suspend? [DAVIES, J.—There is a difference between the positions of trustees under Sections 3 and 4.] For the present point there is no difference, this case however is under Section 3. Trustees under both of these sections were subject to the superintendence of the Board of Revenue under Regulation VII of 1817 and were alike subjects to be dismissed in the manner I have stated. So far as control was concerned no distinction was made between temples under Section 3 and Section 4 of the Religious Endowments Act in which trustees, managers and superintendents are all on the same footing. The plaintiff who was appointed to the office of trustee by Exhibit A took an **[208]** estate of freehold in the office during good behaviour from which the defendants purported to oust him by the order marked as Exhibit N. [DAVIES, J.—That was an order of suspension pending enquiry.] In effect, it was a deprivation. It was indefinite in matter of time and even assuming that the power to suspend existed, it was bad for that reason and for want of sufficient cause and also for want of notice to the plaintiff, but there is no warrant in law for such an assumption. [COLLINS, C.J.—If they can dismiss, why cannot they suspend the trustee?] In the first place, because the trustee by his appointment became the grantee of the office in freehold; in the second place it becomes necessary to consider the limitations on the power of dismissal, which are stated in accordance with authority by SHEPHARD, J.; and in the third place it has to be noted that the original committee-men appointed by Government in 1863 and their successors have no property vested in them by their

(1) 7 M. 466.

(2) L.R. 11 App. Cas. 197 at p. 205.

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appointment, and the trustee whom they appoint becomes, *ipso facto*, the legal owner of the property. [DAVIES, J.—The whole argument reduces the power of the committee to nothing. COLLINS, C.J.—Take it that a trustee does something wrong, can the committee shut him out?] The answer is furnished by *Chinna Rangaiyangar* v. *Subbraya Mudali*(1) cited in the judgment of Shephard, J. [COLLINS, C. J.:—He may be dismissed then subject to the effect of a suit by him for reinstatement.] That is so. See also the case reported next after the case last cited which continues the history under the names of the same parties. [DAVIES, J.—Does not removal imply dismissal and ejectment from office?] The trustee cannot be ejected without recourse to law. [DAVIES, J.—Compare the case of the removal of a municipal officer, if Government determines to remove such an officer, must it bring an ejectment suit?] If he is persistent in, for instance, attending the municipal meetings, Government can take the law into its own hands and abide his action of trespass. If he brings his action of trespass against the chairman of the municipality the defendant cannot justify by pleading only the Government order, but must show misconduct. The trustee's position is comparable with that of a Judge in England who does not like Indian officials hold office during Her Majesty's pleasure, but during good behaviour, see *Dunn* v. *The Queen* (2) **[209]** which emphasizes the distinction. The unsuccessful plaintiff there sued the authority which appointed him to an office not during good behaviour, but during Her Majesty's pleasure and subsequently dismissed him. In such a case it is unnecessary to prove misconduct to justify the dismissal. In *Chinna Rangaiyangar* v. *Subbraya Mudali*(1) suspend and remove are used as synonymous terms. [DAVIES, J.—Then it would be the same in the Civil Courts Act.] The words are controlled by the context. See also Act XXXVII of 1850, Section 25, and *Ponduranga* v. *Nagappa*(3). The appointment is for life. There can be no temporary appointment of trustee or manager or superintendent. What then is meant by suspension pending enquiry? And what are its results? To whom does the property meanwhile belong? Suppose the suspension to be malicious, is the trustee meanwhile responsible or not? If somebody else is put in and brings a suit in his capacity as trustee and afterwards the suspension is shown to be unjustifiable, what is the Court to do in the suit of the person so put in? The position of a person having a freehold in his office and being suspended from that office is one which is inconceivable. There is no legal authority for the position that even a master having employed a servant for a term of years can suspend his servant from his employment. Properly regarded a suspension for misconduct is in law a dismissal provided that there is really misconduct; if the person suspended is afterwards reinstated it is in fact a re-appointment. Regulation VII of 1817 which gave the Board of Revenue no power to appoint a temporary trustee has to be imported into Act XX of 1863. See Section 11 of the Regulation when the trustee is hereditary and Section 12 when he is a nominee, and Section 7 of the Act. [DAVIES, J.—What is removal?] Bringing about the end of his legal office and cessation of his powers as office holder. [DAVIES, J.—Can the committee eject him? *Chinna Rangaiyangar* v. *Subbraya Mudali*(1) is an authority for saying they can remove him without a suit.] Subject to the limitations already pointed out. But on general principles if there is power to dismiss a trustee and appoint a

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(1) 3 M.H.C.R. 334. (2) [1896] 1 Q.B. 116. (2) 12 M. 366.

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new one there is no power to suspend and appoint an *ad interim* trustee. Of course, a Court may in a suit appoint a receiver who will exercise the powers of the trustee who has been dismissed pending [210] the decision whether he has been rightly dismissed. In *Natesa* v. *Ganapati* (1) with which must be taken *Sivasankara* v. *Vadagiri*(2), the word suspend is used as meaning a conditional dismissal. In this view it is important to refer back to *Barton* v. *Taylor* (3) ; see the second plea, page 202. [DAVIES, J. —Suppose the misconduct it is not enough to justify dismissal, cannot they suspend?] No, they cannot temporarily divest him of his estate and they cannot punish. [DAVIES, J.—If Court makes an order of removal under Act XX of 1863, Section 4, what is the effect?] He is a trespasser from that moment, and a suit to eject might, under certain circumstances, be necessary. Here, however, no misconduct before suspension has been established. [DAVIES, J.—There was a *prima facie* case.] But suspension which is necessarily a punishment could not be justified except where actual misconduct is shown. If suspension is justified by only a *prima facie* case not ultimately proved, then want of notice to the trustee is fatal. As to a committee's powers of control over trustees, I do not argue, and never did, that the committee could only compel trustees to produce accounts; they can issue lawful orders as to the application of endowments. Their powers are neither more nor less than those of the Board under the Regulation. It is not an ecclesiastical control but a control over the endowments. They have the powers succinctly stated in Act XX of 1863, Section 22, which provides they shall be no longer exercised by the Government officers. They did not comprise any interference in the ceremonies. The management of endowments does not include these matters. The temple is not the endowment. There are temples without endowments, and they did not come under the Regulation of 1817 nor under the Act of 1863, see Sections 3, 7, 22.

*Sankaran Nayar*.—The property is that of the idol not of the trustee, and the interest of the temple not of the trustee, is to be preserved, see *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* (4), and *Letterstedt* v. *Broeres* (5) as to the removal of a trustee. [SHEPHARD, J.—He can be removed, of course, but, a strong case must be made out, so it has always been held in these cases.] The interest of the temple is the main thing to be observed. [COLLINS, C.J.—But here he has been declared not to [211] have been properly dismissed. He is now the trustee of the temple.] The Regulation gave no new power to the Board of Revenue (*Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai* (6)), but only regulated and defined existing powers already vested in the Board. Moreover, the extent of the powers is not to be gauged by Section 22 which is negative. Section 3 governs this temple. Sections 4, 5 and 6 are immaterial except for the fact that Section 6 refers to trustees as managers of these temples; then comes Section 7 as to the constitution and duties of committees. Section 8 relates to the qualification of committee-men ; Section 9 to the tenure of office ; Section 10 to vacancies in the office. Then Section 12 gives the committee powers over the temple and the property. [DAVIES, J.—This temple has no land but only a money income.] But the point is that it is not only the endowment as distinct from temple that is concerned, but the committee has power over the temple. [SHEPHARD, J.—The Board of Revenue had not the jewels.] That was so in a sense, but there

(1) 14 M. 103. (2) 13 M. 6. (3) L R. 11 App. Cas. 197.
(4) 13 M. I. A. 270 (273). (5) L. R. 9 App. Cas. 371.
(6) 1 I.A. 209 (235).

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was no one else to hold them except the Government peishkar. The case of *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai* (1) is on the facts *ad rem*—there there was a temporary injunction or suspension by the Collector of a newly-appointed trustee for one year. The argument was that the Collector was acting as agent of the zamindar. The Privy Council said no, but acting as Collector under the powers which existed before the Regulation. The Regulation does not limit the rights of the Collector, but prescribes how they are to be exercised. All the acts complained of in the present case were such as involved the use of temple property and the employ of the temple servants. [SHEPHARD, J.—Can you read Exhibit N and say that the committee had the interest of the temple primarily in their minds?] The matter is alleged at the outset—it is said he has occasioned loss, and also they alleged misuse which suffices to bring it within the section. As to trustees of this temple, there is no reference to any trustee or manager in the early records; the Collector was in direct management. [SHEPHARD, J.—You say the position of affairs was as in 1841 except that the committee is in the place of Collector.] Yes, under Sections 7 and 12 except for Section 11. [SHEPHARD, J.—You say [212] the decision that a committee cannot hold property is wrong.] Yes, if it is necessary I am prepared to show that. [SHEPHARD, J.—Section 11 is important as recognizing a trustee apart from the committee.] The trustee took the place of the local agent not of the Board. The place of the Board was taken by the committee. It was Board and Collector till 1841, the Board and manager till 1863. The Board could remove the manager at any time unless they were precluded by the deed of appointment. In 1842 four stalathars were appointed hereditarily, and the trustees kept under control of the Board. As to the argument with reference to the suits, the Collector and any manager *de facto* could sue. The argument about suits and the ownership of the property falls to the ground if it is remembered that the idol is the owner, and suits are brought for it. See *Queen-Empress* v. *Muttusami Pillai* (2), where COLLINS, C.J., and PARKER, J., say:—"The Devastanam committee appointed "under Act XX of 1863 exercise the same powers of supervision that "were formerly exercised by the Board of Revenue under Regulation VII "of 1817, but the property of the temple is not vested in them, nor do "they srepresent the property. The person who represents the property is "the trustee or manager, who is indeed appointed, and may, no doubt, be "removed by the committee for sufficient cause. But the trustee or "manager is not in the position of a clerk or servant removable at the "pleasure of the committee. He holds his office permanently, though sub-"ject to removal for misconduct. It was held in *Ponduranga* v. *Naggappa*(3) "that the members of a devastanam committee were not entitled as "against the trustee or manager to be put in possession of the property "of the temple or to the receipt of its income. The right view appears to "be that the deity is regarded as the owner of the temple property, and "the trustee or the manager appointed by the committee is the agent of "the deity subject to the committee's control." The manager is an agent of the idol only subject to the committee's control. Where the action of the committee is in question, it has to be considered whether it is against the interest of the idol in the particular circumstances. As to the decision in [213] *Chinna Rangaiyangar* v. *Subbraya Mudali* (4), it shows that powers to dismiss and suspend are all traceable to the express powers of

(1) 1 I. A. 209 (235).
(2) Criminal Appeal No. 215 of 1895 (unreported).
(3) 12 M. 366.
(4) 3 M.H.C.R. 334.

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general superintendence, and must be judged as any other act of general superintendence is to be judged. So the powers are not to be construed as statutory powers. Were it so, it might be that power to dismiss would not include power to suspend. In *Natesa* v. *Ganapati* (1) if there had not been so many trustees the case wculd have been different, and the result might have been different. Before the case of *Chinna Rangaiyangar* v. *Subbraya Mudali* (2), the Sudder Court first held that Civil Courts had no power as to dismissal only the Board (*Daseekamiengar* v. *Singamiengar* (3), see also the decision in *Kassyvassy Kistna Putter* v. *Vangala Shangaranat Josser* (4)). The High Court said we will not go so far as that, but will allow the person dismissed to go to Court after dismisssal. The second Sudder case quoted above took the middle course and said that the person aggrieved might go either to the Board of Revenue or to the Court. This explains *Chinna Rangaiyangar* v. *Subbraya Mudali* (2) which does not rule that any new rights (not enjoyed by the Board of Revenue) were given by Act XX of 1863 to the committee. Page 76 of Book III gives the history between 1841 and 1863. See *Venkatasa Naidu* v. *Sadagopasami Iyer* (5) and *Jusagheri Gosamiar* v. *The Collector of Tanjore* (6). This Srirangam temple is admittedly under Section 3 of Act XX of 1863. Section 7 of the Act embodies Sections 11, 12 and 13 of the Regulation, but that presupposes a vacancy, *i.e.*, a previous manager's superintendence. What was to be done where as here there was none such? Clearly the Board could appoint, not therefore under the section, but under its general powers of superintendence. *Barton* v. *Taylor* (7) quoted on the other side helps me, because it recognizes the distinction between suspension and dismissal: but it held that although there were no rules the power was not to be used further than necessary. [SHEPHARD, J.—It was said it could not be done punitively but by way of self-defence.] My contention is that the suspension was necessary in the interests of the trust. It is **[214]** to be noted also that there the person suspended was not a subordinate, but an equal member of the assembly. As to punitive suspension *Natesa* v. *Ganapati* (1) shows it is legal under this Act to suspend or dismiss. Compare also District Municipalities Act IV of 1884, Section 42; Local Boards Act V of 1884, Section 45; Civil Courts Act, Section 18; the Enquiry into offences of public servants, Act XXXVII of 1850, Section 25, and Legal Practitioners Act XVIII of 1879, Section 14. The committee can be the trustees, see Section 12 of Act XX of 1863; they are not always the only trustee (*Ponduranga* v. *Nagappa* (8)), but see *Ramiengar* v. *G. Pandarasannada* (9), which says that Section 4 refers to cases where the right of management is shown and not only actual possession and management. The case of *Vijaya Ragava* v. *Secretary of State for India* (10) does not apply; there there was no question of general superintendence, and no question of a subordinate, but the question related to a statutory power, and in such a case suspension is unnecessary, because the councillor has no executive function, and there was no obstruction. [DAVIES, J.—Also that was only an appointment for a term.] As to the evidence—can this bench go into evidence? or

(1) 14 M. 103. (2) 3 M.H.C.R. 334.
(3) Sudder Adalat Decisions (1857), 5.
(4) Sudder Adalat Decisions (1858), 39. (5) 4 M.H.C.R. 404 (408).
(6) 5 M.H.C.R. 334 (341). (7) L.R. 11 App. Cas. 197.
(8) 12 M. 366. (9) 5 M H.C.R. 531. (10) 7 M. 466.

only into the point of law referred? See Section 575, Civil Procedure Code.

[*Per cur.*—The whole appeal is referred and the whole is open for argument. SHEPHARD, J.—But you must assume that the other appeal is rightly decided and there was no cause for dismissal.]

The evidence duly considered is sufficient to justify the suspension. *Hayman* v. *Governors of Rugby School* (1) shows that the discretion of a committee cannot be overruled; and that discretion can be exercised on evidence not strictly proved, see *In re Burnham National Schools* (2).

*Bashyam Ayyangar* in reply: referred to *Venkatesa Nayudu* v. *Shree Shatagopa Swami* (3). As to *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai* (4), the sovereign having power to see that the funds were devoted to proper purposes and to appoint trustees, the question there was whether Collector's act should be ascribed to him as representative of Government or as representative of zamindar; the Privy Council said the former.

## JUDGMENT.

**[215]** COLLINS, C. J.— This appeal was re-heard by SHEPHARD and DAVIES, JJ., and myself under the provisions of Section 575 of the Code of Civil Procedure, the two first-named Judges having differed in opinion.

The suit was brought in the District Court of Trichinopoly by the plaintiff—the permanent trustee of the Srirangam temple—against the temple committee of the said temple for suspending him from performing the duties of his office—claiming an injunction and also damages.

I have to consider two questions—*firstly*, has the committee power to suspend the trustee of the temple; and *secondly*, if the power exists, were the members of the committee justified under the circumstances in exercising the power?

This is one of those frequent disputes between the worshippers of Vishnu—calling themselves, respectively, Vadagalais and Tengalais—and it arose in this wise;—there was a vacancy in the office of trustee of the Srirangam temple, and on the first of May 1892 the plaintiff was elected by a majority of the then existing committee permanent trustee and manager of the temple. The temple is not a purely Tengalai temple (see Acting District Judge's proceedings), although the majority of the worshippers as well as the officials are undoubtedly Tengalais—the plaintiff was a Vadagalai. Sometime after the plaintiff was appointed some vacancies in the committee were filled up, and the majority of that body were Tengalais. As might be expected, petitions were at once presented against the plaintiff. He was charged with having obtained the office of trustee by fraudulent or improper means—that he unduly favoured his relative, the fifth defendant,—and that in the matter of ritual and the observance of the ceremonies he had not observed the usual customs, had used the revenues of the temple improperly and by various means had outraged the feelings of the Tengalai sect. These charges against the plaintiff were, if true, sufficiently serious to justify the committee in holding an enquiry.

All they appear to have done, however, was to ask some of the petitioners, if they could prove the allegations contained in the petition, and they naturally received an answer in the affirmative. The majority of the committee thereupon wrote various minutes recommending that the

(1) L.R. 18 Eq. 28, at p. 72.
(2) L.R. 17 Eq. 241, at p. 248.
(3) 7 M.H.C.R. 77 (81).
(4) 1 I. A. 209.

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plaintiff should be suspended—one of the grounds being that plaintiff was a Vadagalai, whereas the temple [216] is a Tengalai one, and they also suggested that disturbances might take place during the festival. This festival commenced in December and the principal day of the festival was the 30th December 1892, on which day special honours would be paid to plaintiff as trustee. On the 29th December 1892 the first, second and third defendants served on the plaintiff the following order (Exhibit N) :—

"Yadast from the members of the committee for the devastanam of "Trichinopoly taluk to K. Seshadri Ayyangar, permanent manager of "Srirangam devastanam.

"As it is necessary that you should be suspended from doing the "duties of manager pending the inquiry and result of the petitions receiv-"ed in the office of the committee in which it is stated, among other "things, while there were three members on the committee, you were ap-"pointed as manager by two of them without the cognizance of the third, "which is contrary to rules, that one of the members who so appointed "you was your near relation, namely, your brother, that the other mem-"ber appointed you out of fear, learning that you attempt to take out a "Civil warrant against him when he was so ill as to be in his last moments, "you having previously presented an execution petition to the Court for "the execution of a decree you had obtained against him and caused an "objection notice to be served on him, and also from a desire for money, "that within the short period that has elapsed after you became a mana-"ger you have caused loss of property and money to the devastanam, that "you have conducted several things in the temple that are contrary to "custom, so as to cause the occurrence of riots concerning the Tengalais "and the Vadagalais, that you conducted the Tidal festival of the 28th "Adi on the 29th, contrary to the temple rules and long custom, that you "committed in connection with it irregular acts very disrespectful to the "God and that you so conducted the festival contrary to custom out of "regard for M.R.Ry. Vasudeva Ayyangar Avergal, who is your brother "and a committee member, you shall cease to do the devastanam duties "from the date of receipt of this yadast. Further, you shall deliver "charge of all proceedings and records connected with devastanam, that "are with you, to T. Ratna Mudaliar Avargal, who is another manager, "and report (that you have done so).

[217] "You will be informed of the time when the enquiry into the "petitions is to be commenced.

| | | |
|---|---|---|
| 29*th December* 1892. | (Signed) | Krishna Ayyangar, |
| | ( ,, ) | Tota Ramasami Chetti, |
| | ( ,, ) | S. Nataraja Ayyar. |
| | | *Committee Members.*" |

It will be observed that the charges against the plaintiff refer to the past; that the first charge is that the plaintiff was illegally elected to the office of trustee. He is not called upon for any explanation, but is then and there suspended on the eve of the 30th December—the day on which certain honours would be paid to him.

In answer to N the plaintiff sent Exhibit Q :—

"To

THE MEMBERS OF THE DEVASTANAM COMMITTEE,

*Trichinopoly Taluk.*

"Yadast sent by K. Seshadri Ayyangar Avergal, permanent manager "of Srirangam devastanam.

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"The yadast No. 17, dated 29th ultimo has been received from that "office.

"We, as far as we know, cannot understand, if there is any rule that "the members could accept the petitions referred to in the yadast, or that "such proceedings could be taken thereupon or that we should be bound "thereby.

"As steps should be taken after knowing the contents, &c., of the "said petitions, I request that true copies may be caused to be made of "the said petitions and of the proceedings in connection with them exist- "ing in the office of the members and of the circulation proceedings and "forwarded to me within three days.

9—1—93. (Signed) Seshadri Ayyangar."

Exhibit Q is said to be grossly insubordinate and upon its receipt the committee at once dismissed the plaintiff from his office.

The plaintiff thereupon commenced two actions against the committee in the District Court of Trichinopoly—one for suspending him and the other for dismissing him. Both suits were tried together. All the charges of misconduct against the plaintiff failed, but the District Judge, in a not very satisfactory judgment, held that the suspension and dismissal were both justified—the dismissal on the ground that Exhibit Q was grossly insubordinate.

[218] Exhibit Q appears to me a proper reply to the committee who had suspended plaintiff, and contains, as far as I can gather, no elements of insubordination, and I entirely differ from the view taken by the District Judge on this matter.

A Divisional Bench, consisting of SHEPHARD and DAVIES, JJ., reversed the decree of the District Judge so far as the dismissal was concerned for the reasons given in their judgments, but differed as to the right of the committee to suspend him, SHEPHARD, J., holding there was no power to suspend plaintiff, and awarding him damages for such suspension, and DAVIES, J., holding that the committee had the power to suspend and was justified in the course they adopted.

The Acting Advocate-General, for the plaintiff-appellant, contends that the committee has no power to dismiss the trustee without calling upon him to show cause why he should not be so dismissed; that he cannot be dismissed except for misconduct in the performance of the duties of his office; and he denies altogether that the committee can suspend, and he further argues that the appellant was guilty of no offence that warranted either his dismissal or suspension. Mr. Sankaran Nayar, for the respondents, contends that the committee has full power at their discretion either to suspend or dismiss a trustee and, further, that in this case the committee was justified in suspending the plaintiff, and that they acted in good faith and in the interest of the temple.

It is true that the British Government had asssumed a certain control over these endowments, apparently from the time they took possession of the country. In *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai*(1), the Privy Council stated that the British Government, by virtue of its sovereign power, asserted, as the former rulers of the country had done, the right to visit endowments of this kind and to prevent and redress abuses in their management.

The Government thus claimed and exercised a general power of superintendence over the temples and by Regulation VII of 1817 conferred

(1) 1 I.A. 209.

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that right upon the Board of Revenue. In the preamble of that Regulation (VII of 1817) it is stated that "the Regulation was for the "due appropriation of the rents and produce of lands granted for the "support of. . . . Hindu temples and [219] that there are "grounds to believe that in many instances the produce of such endow- "ments has been misappropriated and that it is the duty of the "Government to provide that all such endowments be applied according "to the real intent and will of the grantor." The Regulation, therefore, enacts that the general superintendence of all endowments in land or money for the support of Hindu temples be vested in the Board of Revenue—such Board to take measures for the due appropriation of such endowments—to appoint agents—the Collector of the Zillah to be one—to ascertain particulars of such endowments and to report to the Board the names of the present trustees or managers of such institutions and by what authority appointed—such agents are to recommend fit persons for the confirmation of the Board of Revenue in cases where the right of nomination appertains to Government and the Board may appoint such persons so recommended or make such other provision for the trust, management or superintendence of such institutions as may to them seem right. The Regulation also enacts that individuals deeming themselves injured by any orders passed under this Regulation, may sue for the recovery of their rights or for damages.

By Clause XV, trustees, managers or superintendents guilty of fraud or embezzlement of the revenues, funds or other property of the said institutions shall be punished.

The question now arises what was the general superintending power after 1817 possessed by the Board of Revenue and conferred by the Regulation ?

The Board could undoubtedly prevent and redress abuses ; but in my opinion an enquiry must take place to ascertain if such abuses really existed, and if it was found that such did exist, it could be prevented and redressed ; but if any individual considered himself injured by any order of the Board he might sue and claim damages for such injury, (Clause XIV). I am of opinion that the Board of Revenue possessed no arbitrary power. A trustee or manager, for instance, could not be dismissed or suspended at the mere will and pleasure of the Board, but only for just cause which must be ascertained by enquiry. From 1817 to 1841 the Board of Revenue exercised the general superintendence before alluded to, but in the latter year the Government resolved to relinquish all interference with native temples, reserving only to themselves the management of the lands endowed.

[220] By Act XX of 1863, Section 1, so much of Regulation VII of 1817 (Madras Code) as related to endowments for the support of Hindu temples or other religious purposes was repealed.

Section 3 enacts that in case of every temple. . . . . to which the provisions of Regulation VII of 1817 are applicable and the nomination of the trustee, manager or superintendent whereof at the time of the passing of this Act is vested in or may be exercised by the Government or any public officer or in which the nomination of any such trustee, &c., shall be subject to the confirmation of the Government or any public officer, the Local Government shall make special provision. (It is conceded that the plaintiff's office is included in this Section).

Section 7 enacts that in all cases described in Section 3 the Local Government shall appoint one or more committee in every division or

district and such committee . . . . shall exercise all the powers heretofore performed by the Board of Revenue and local agents, except in respect of property specially provided for under Section 21 of the Act.

By Section 11 no member of a committee shall be a trustee or manager of a temple under charge of such committee. The committee, therefore appointed under this Act, have the power conferred on the Board of Revenue by Regulation VII of 1817—that is a general superintendence and a power to prevent and redress abuses and nothing more.

Section 14 gives any person interested in the temple power to sue the trustee or manager or the member of any committee of a temple for any misfeasance, breach of trust or neglect of duty. The Court may direct the specific performance of any act by such trustee, manager or member of a committee, may decree damages and costs against them and may also direct their removal. I will now consider the position of a trustee or manager of such religious institutions as are referred to in Act XX of 1863, Section 3. It is clear that he is not a servant of the committee. He holds his office permanently. He represents the property of the temple which is vested in law in the God or idol. (See *Queen-Empress* v. *Muttusami Pillai* (1).) Under certain circumstances he may be dismissed by the committee, but only on good and sufficient grounds and after an enquiry into the facts, and such dismissal may be set aside by **[221]** the Courts of Law. In *Chinna Rangaiyangar* v. *Subbraya Mudali* (2) SCOTLAND, C.J., and COLLETT, J., held that a trustee could be dismissed on good and sufficient grounds without having recourse to a civil suit, and I am bound by that decision.

The learned Judges in *Chinna Rangaiyangar* v. *Subbraya Mudali* (2) observe that the authority to suspend or remove for just cause was properly incident to the principal duties and responsibilities of the Board of Revenue, and was impliedly given, and they refer to some cases decided by the Court of Sadr Adalat. These cases, however, relate to removal of the trustee for misappropriation of the funds or fraudulent abuse of the trust. I am doubtful whether the Judges in *Chinna Rangaiyangar* v. *Subbraya Mudali* (2) meant that the Board of Revenue had a general power to remove trustees or could only remove them if they had been guilty of offences mentioned in Clause 15 of the Regulation VII of 1817.

The power of suspension by the committee is, in my judgment, the same as the power of dismissal. The committee, having made due enquiry and having called on the trustee for an explanation, may suspend for good and sufficient causes, but not otherwise. In the present case I am of opinion that the suspension was illegal—no sufficient enquiry having been made into the allegations contained in Exhibit N, and no explanation required from the plaintiff; and I further think, after reading and considering the whole of the evidence, that the committee were actuated throughout by the fact that the plaintiff was a Vadagali and that the principal cause of the suspension on the 29th December was to prevent the plaintiff from receiving the usual honours paid to a trustee on one of the principal days of the festival, *viz.*, December 30th. I do not think the action of the committee in suspending plaintiff was for the purpose of preventing a disturbance as now alleged by the respondent.

I am of opinion that the plaintiff is entitled to damages and the amount decreed by Mr. Justice Shephard—one thousand rupees—appears to me a

(1) See 21 M. page 212 (Criminal Appeal No. 215 of 1895—unreported.—ED.)
(2) 3 M. H. C. R. 334.

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reasonable sum. The decree of the District Court must be reversed, and a decree given for plaintiff in the terms of the prayer in the plaint with Rs. 1,000 damages. The damages and the cost throughout are to be paid by the first, second and third respondents—the other respondents will bear their own costs.

[222] SHEPHARD, J.—I adhere to the opinion already expressed by me, and I concur in the terms of the decree proposed by the Chief Justice.

DAVIES, J.—I adhere to my judgment as already pronounced.

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21 M. 222=8 M.L.J. 126.

## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Davies.*

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RAMASAMAYYAN AND OTHERS (*Defendants Nos.* 1, 3 *and* 4), *Appellants v.* VIRASAMI AYYAR (*Plaintiff*), *Respondent.**
[3rd and 21st February and 10th March, 1898.]

*Transfer of Property Act—Act IV of* 1882, *Section* 85—*Mortgage suit against Hindu mortgagor and two sons—Sale of mortgage premises—Subsequent suit for share of a third son.*

A Hindu having three sons executed a mortgage in favour of the defendants, who subsequently obtained a decree for sale on the mortgage and brought the property to sale in execution and purchased it themselves, the mortgagor and two only of his sons being brought on to the record. It did not appear whether the plaintiffs in that suit were aware of the interest of the third son, who now sued to recover his one-quarter share of the mortgage premises claiming that the previous proceedings were not binding on him and alleging that the mortgage was unsupported by consideration:

*Held*, that the plaintiff was entitled to have the question tried whether there was really a debt owing by the father to support the mortgage.

*Quære*: Whether *Bhawani Prasad* v. *Kallu* (17 A. 537) lays down the right rule with reference to Transfer of Property Act, Section 85.

[Appr., 27 C. 724; 22 M. 207; R., 34 A. 549 (566)=9 A.L.J. 819=15 Ind. Cas. 126; 34 B. 354 (358)=12 Bom.L.R. 219=5 Ind. Cas. 967; 28 C. 517=5 C.W.N. 640; 22 M. 372; 27 M. 326=14 M.L.J. 181; 12 Bom.L.R. 811=7 Ind.Cas. 990 (991); 12 Bom L.R. 940 (943); 14 C.L.J. 530 (534)=12 Ind.Cas. 155; 2 N.L.R. 90; 5 N.L.R. 117; 9 N.L.R. 1 (7); 64 P.R. 1908=132 P.W.R. 1908.]

SECOND appeal against the decree of F. H. Hamnett, Acting District Judge of Tanjore, in appeal suit No. 141 of 1896, reversing the decree of T. Venkataramayya, District Munsif of Kumbakonam, in original suit No. 379 of 1894.

The plaintiff sued for possession of a one-fourth share of certain land which had been mortgaged on 18th October 1875 by his father to the father of defendants Nos. 1 to 4. On the death of the mortgagee the agent of the Court of Wards had taken [223] charge of his estate on behalf of the defendants, and a suit on the mortgage had been brought on their behalf in 1889 against the mortgagor and his sons other than the present plaintiff. A decree for sale was passed and the land having been brought to sale was purchased on behalf of the present defendants. The plaintiff now sued as above to recover his one-fourth share in the land alleging that there was no consideration for the mortgage and that,

* Second Appeal No. 1435 of 1896.

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as he was not a party to the mortgage suit, the decree passed therein was not binding on him. It was not shown that the plaintiffs in the former suit were then aware of the plaintiff's interest. The District Munsif dismissed the suit: but his decree was reversed on appeal by the District Judge who passed a decree as prayed, holding that by reason of Transfer of Property Act, Section 85, the decree in the mortgage suit and the subsequent proceedings in execution were not binding on the plaintiff and were inoperative so far as his share in the property was concerned.

The defendants Nos. 1, 3 and 4 preferred this second appeal.

*V. Krishnasami Ayyar* and *R. A. Krishnasami Ayyar*, for appellants.

*Pattabhirama Ayyar* and *Balamukunda Ayyar*, for respondent.

## JUDGMENT.

SHEPHARD, J.—The parties to this appeal are, on the one hand, the infant son of a judgment-debtor named Ramayyan, and on the other the judgment-creditors of the same person who, in execution of their decree, purchased the property previously held by them under an hypothecation. The District Munsif dismissed the suit, without hearing any evidence, on the ground that the plaint disclosed no cause of action. The District Judge on appeal reversed this decree and granted a decree in the plaintiff's favour, holding that the plaintiff's original interest in the property had been in no way affected by the sale thereof, because the plaintiff had not been joined with his father and brother in the suit which led up to the sale. The District Judge bases his judgment on the ruling of the Full Bench of the Allahabad High Court in *Bhawani Prasad* v. *Kallu*(1). In that case the plaint was similar to the plaint now before us in that it did not allege that the debt incurred by the father was incurred for immoral or impious purposes. The plaintiff there relied, as the plaintiff-respondent does here, on the fact that he was no party to the mortgage decree obtained against [224] his father. The judgment of the majority of the Court in that case, like the argument in the present case, proceeded entirely upon the ground that the law has been altered by the enactment of Section 85 of the Transfer of Property Act, which directs that "all persons having an "interest in the property comprised in a mortgage must be joined as par-"ties to any suit under this chapter relating to such mortgage. Provided "that the plaintiff has notice of such interest." Independently of the statute, the position of a purchaser, who in a sale in execution of a decree against the father bought the entirety of the estate, is the same as regards the son, whether the decree was a mortgage decree or a decree for money. In either case all that the son can claim is that, not having been a party to the sale or the proceedings which led up to it, he should have an opportunity of showing that there was in reality no such debt as to justify the sale (*Mussamut Nanomi Babuasin* v. *Modun Mohun* (2), *Kunhali Beari* v. *Keshava Shanbaga* (3)).

The theory is that as the father may, in order to pay a just debt, legally sell the whole estate without suit; so his creditor may bring about such sale by the intervention of a suit. It is not necessary that the son shall be called in whether the sale is voluntary or procured by a proceeding in *invitum*, and there is no object in joining him except to preclude him from afterwards questioning the nature of the debt. According to the decision in *Bhawani Prasad* v. *Kallu* (1) a distinction must be made

(1) 17 A. 537. (2) 13 I.A. 1 (9). (3) 11 M. 64, (76).

1898 MARCH 10. — APPELLATE CIVIL. — 21 M. 222 = 8 M.L.J. 126.

between a voluntary and an enforced sale, when such sale is the consequence of a mortgage suit; and in this latter case it must be held that no interest passes except that of those who are made parties to the suit, and this distinction is insisted upon because the Legislature has enacted as a written rule of law what was previously a well-recognized rule of procedure. Having regard to the theory above stated I cannot think that this effect should be given to the section. The section is certainly imperative in its terms. Expressed in any other mood it would be vain. But a sanction is not wanting, for inconvenient consequences may follow on a neglect of the law. The mortgagee who omits to join persons interested in the property may have his suit dismissed or, if he obtains a decree, may find notwithstanding that he has to institute [225] or defend another suit. Nevertheless as against the Hindu father the decree which is passed in the absence of his sons is a good and valid decree. The creditor, although he may have failed to obey the rule contained in the section, has got the decree which he requires as a foundation for his application to sell the whole estate. In the Allahabad Court this proposition would be denied. In effect it must be said that the decree though valid against the father, has since the Act was passed lost the peculiar quality which it previously possessed. It can no longer be made the means of compelling the father to sell the estate. This seems to me a conclusion which is wholly unwarranted by the terms of the section. I agree with Mr. Justice Banerji in the reasons which he has given for dissenting from the rest of the Court. In addition I would only refer to the proviso appended to the section. The effect of the proviso is that, unless the mortgagee has notice of the existence of the son, he is not affected by the section, and therefore presumably the decree which he obtains and the subsequent proceedings therein are not vitiated by the omission to join the son. It follows that the extent of the interest obtained by the purchaser may depend on the knowledge or want of knowledge of the mortgagee at the time of the institution of the suit.

I think we ought to be slow to adopt a construction which would lead to this anomaly as well as the other anomalies dwelt upon by Mr. Justice Banerji.

For these reasons I would reverse the decree of the District Judge, but inasmuch as the plaint in effect alleges that there really was no debt owing by the father I think the respondent is entitled to have that question tried. It is argued on behalf of the appellant that the only question which the son of a Hindu debtor can raise is as to the nature of the debt, and that he cannot question the existence of a debt which forms the foundation of a decree against his father. According to this contention it would be open to the father by confessing judgment to procure by indirect means the sale of the entire estate when he could not lawfully alienate it by a voluntary conveyance. The limitation which is imposed by Hindu law on the father's power of alienation would become illusory.

But this is clearly not the law. Whether the sale is a voluntary or an enforced sale, its validity depends upon the existence of a just debt in satisfaction of which the sale is effected. If authority [226] is needed the *dictum* in *Mussamut Nanomi Babuasin* v. *Modun Mohun* (1) may be cited as showing that the son may question alike the existence and the nature of the debt in consequence of which the sale has taken place.

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(1) 13 I.A. 1 (18).

The decrees of both Courts must be reversed and the suit must be remanded for retrial by the District Munsif. It must be understood that no questions have been decided in this appeal save those two questions which arise upon the allegations made in the plaint. The respondents must pay the costs of this appeal. Other costs will be provided for in the revised decree.

1898 MARCH 10. — APPELLATE CIVIL. — 21 M. 222 = 8 M.L.J. 126.

DAVIES, J.—I agree to the reversal of the Lower Appellate Court's decree, because there was no allegation in the plaint and nothing to show that the mortgagees who brought the suit wherein the sale was decreed had notice of the plaintiff's interest. Their omission therefore to make the plaintiff also a party to that suit did not *ipso facto* entitle the plaintiff to a decree, for in the Allahabad case the ruling in which the Judge has followed, and with which I cannot say that I disagree, the fact was there had been such notice. I also agree to the reversal of the decree of the Court of First Instance and to the order of remand which my learned colleague has directed in the case, because there can be no doubt that the plaintiff's suit lies to show, as is alleged in the plaint, that there was no consideration for the mortgage or, in other words, the non-existence of the debt by which it is sought to bind the plaintiff's share in the family property.

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21 M. 226.

## APPELLATE CIVIL.

*Before Mr. Justice Davies and Mr. Justice Boddam.*

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CHINNA OBAYYA (*Plaintiff*), *Appellant* v. SURA REDDI AND ANOTHER (*Defendants Nos.* 1 *and* 2), *Respondents*.*
[15th February, 1897.]

*Hindu law—Illatom son-in-law—Right to partition.*

The question whether an illatom son-in-law can demand partition from his father-in-law is not a pure question of law, but one that depends upon custom and can only be determined upon evidence.

[227] APPEAL against the decree of W. G. Underwood, District Judge of Cuddapah, in original suit No. 10 of 1894.

The plaintiff was the illatom son-in-law of defendant No. 1, and he brought this suit for partition of the family property. Among the issues framed, the eleventh was:—"Is the suit prematurely brought?" The District Judge decided this issue against the plaintiff and dismissed the suit on the ground that an illatom son-in-law is not entitled to partition during the life-time of his father-in-law.

The plaintiff preferred this appeal.

*Ramachandra Rau Saheb*, for appellant.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*), *Ethiraja Mudaliar*, and *Tiruvenkatachariar*, for respondents.

## JUDGMENT.

The question whether an illatom son-in-law can demand partition from his father-in-law is not a pure question of law, as the Judge has treated it, but one that depends upon custom and can only be determined upon evidence taken as to the custom. Such a question was indeed raised

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* Appeal No. 71 of 1896.

1897 FEB. 15. — APPELLATE CIVIL. — 21 M. 226.

in *Hanumantamma* v. *Rami Reddi* (1), but was not decided in that case. The Judge should, therefore, have acceded to the plaintiff's request to permit him to adduce evidence as to the custom alleged to be one of the incidents of an illatom adoption. We must, therefore, reverse the decree of the Judge and remand the case for re-trial, directing the eleventh issue to be dropped altogether and the following issue to be substituted for it, *viz.*, whether it is one of the incidents of an illatom adoption that the adoptee may demand partition from his father-in-law. The costs hitherto incurred will be provided for in the revised decree.

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**21 M. 228=7 M.L.J. 188.**

## [228] APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.*

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KRISHNA BHATTA (*Plaintiff*), *Appellant* v. SUBRAYA AND OTHERS (*Defendants Nos.* 1, 3 *and* 2), *Respondents.**
[2nd April, 1897.]

*Limitation Act—Act XV of* 1877, *Section* 5—*Appeal admitted after time by District Court—Power of Subordinate Court to whom the appeal is transferred.*

A District Court by an *ex parte* order admitted an appeal filed after the expiry of the period of limitation and transferred it for disposal to the Subordinate Court, in which objection was taken that the appeal was time-barred. The Subordinate Judge held that he could not entertain the objection, he heard the appeal and remanded the suit:

*Held*, that the Subordinate Court had jurisdiction to entertain and dispose of the objection, and that the objection was sound and that the order of remand should be set aside.

[R., 25 M. 166=11 M.L.J. 406.]

APPEAL against the order of U. Achutan Nayar, Subordinate Judge of South Canara, in appeal suit No. 160 of 1895, remanding to be re-heard original suit No. 37 of 1894 on the file of the District Munsif of Puttur.

This was a suit for money in which the District Munsif passed a decree for plaintiff. Defendants presented their appeal in due time to the District Court, together with an application for permission to appeal *in forma pauperis*. After a protracted inquiry the District Judge refused the application and rejected the appeal, which, however, he said he would admit on payment of the Court fee. The appellant accordingly paid the Court-fee and the District Judge made an order, *ex parte*, admitting the appeal, notwithstanding that the period of limitation had already expired. The appeal was then referred by the District Judge to the Subordinate Judge for disposal. Objection was taken at the hearing on the ground of limitation, and *Bishnath Prasad* v. *Jagarnath Prasad* (2) was quoted. The Subordinate Judge referred to *Patcha Saheb* v. *Sub-Collector of North Arcot* (3) and *Jhotee Sahoo* v. *Omesh Chunder Sircar* (4), and held that the appeal was not barred by limitation, and that, if it were, he had no jurisdiction to go behind the order of the [229] District Court. In the event he reversed the decree of the District Munsif and remanded the suit.

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* Appeal against Order No. 58 of 1896.

(1) 4 M. 272. (2) 13 A. 305. (3) 15 M. 78. (4) 5 C. 1.

The plaintiff preferred this appeal. 1897 APRIL 2.

*Narayana Rau*, for appellant.

*Pattabhirama Ayyar*, for respondents.

APPELLATE CIVIL.

21 M. 228= 7 M.L.J. 188.

JUDGMENT.

We have all the materials before us to form our opinion and have arrived at the conclusion that the District Judge acted illegally in admitting the appeal on the 12th June 1895. At that date the appeal was many months out of time, and the affidavit shows no ground for excusing the delay. The Subordinate Judge considers that he was not entitled to question the order of the District Judge and relies on *Jhotee Sahoo* v. *Omesh Chunder Sircar* (1).

But seeing that the order was *ex parte* and that the appeal was transferred by the District Judge to the Subordinate Judge, we think that upon that transfer all the powers of an Appellate Court became vested in the Subordinate Judge. Otherwise an appeal would be partly in one Court and partly in another.

We do not agree with the decision in *Jhotee Sahoo* v. *Omesh Chunder Sircar* (1). It is urged before us that the point of time cannot be taken on appeal from an order of remand, but if the Subordinate Judge was wrong in entertaining the appeal, it is clear that he ought not to have made an order of remand.

We must allow the appeal and set aside the order of the Subordinate Judge and restore the decree of the District Munsif with costs throughout.

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**21 M. 229.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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SANJIVI (*Defendant No.* 1), *Appellant v.* JALAJAKSHI AND ANOTHER (*Plaintiff and her Representative*), *Respondents.**
[8th July, 1897.]

*Hindu law—Devadasi—Adoption—Illegal purpose.*

The plaintiff sued as the adopted daughter of a deceased dancing woman to recover a share of the property left by her. It appeared that the adoption of the [230] plaintiff, which took place in 1871 when she was six years old, was made with the intention of bringing her up to practise prostitution even during her minority:

*Held*, that the adoption was invalid.

APPEAL against the decree of O. Chandu Menon, Subordinate Judge of South Canara, in original suit No. 41 of 1894.

The plaintiff sued to recover a moiety of the property left by a deceased dancing woman who had adopted successively the defendant and the plaintiff. The plaintiff's adoption took place about the year 1871. Issues were raised as to the validity of the adoption of the plaintiff. These issues were determined by the Subordinate Judge in favour of the plaintiff. He referred to *Chalakonda Alasani* v. *Chalakonda Ratnachalam*(2), *Kamakshi* v. *Nagarathnam* (3), *Venku* v. *Mahalinga* (4), and *Muttukannu* v. *Paramasami* (5), and in the result he passed a decree for the plaintiff.

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* Appeals Nos. 227 and 236 of 1895.

(1) 5 C. 1. (2) 2 M.H.C.R. 56. (3) 5 M.H.C R. 161.
(4) 11 M. 393. (5) 12 M. 214.

1897 JULY 8. — APPELLATE CIVIL. — 21 M. 229.

The defendant No. 1 preferred this appeal.

*Ramachandra Rau Saheb* and *Madhava Rau*, for appellant.

*Narayana Rau*, for respondent No. 2.

## JUDGMENT.

The plaintiff and first defendant are dancing girls. The plaintiff claims a share in the property of her adoptive mother, the deceased Lacha. The first defendant, another adopted daughter of Lacha, denies the plaintiff's adoption.

We have no doubt but that the plaintiff was brought up as an adopted daughter with the first defendant by the deceased Lacha. The evidence as to the fact of adoption is not very clear, but on the whole we accept the conclusion of the Subordinate Judge that there was an adoption and such adoption was, in effect, admitted by the first defendant so long ago as 1885. But the validity of the adoption is questioned on two grounds: firstly, because the adoption of the plaintiff, who was then a minor, was made after the Penal Code came into force, and with the intention of bringing her up to practise prostitution even during her minority and, secondly, because there is no sufficient proof of local usage to support the validity of an adoption by a dancing girl during the lifetime of a daughter previously adopted. We think that the first objection is valid. That the intention of the adoption was, as alleged, is clear from the evidence of the plaintiff's own second witness. The evidence shows that Lacha herself practised [231] prostitution and took the plaintiff and defendant with her to nautches during their minority.

The evidence also shows that, from the time that plaintiff and first defendant arrived at puberty, they have been prostitutes.

In these circumstances it is idle, in the absence of any trustworthy evidence to that effect, to contend, as plaintiff's vakil now does, that the plaintiff's adoption was with a view to giving her in marriage rather than for prostitution. An adoption made as this was with such intention after the Indian Penal Code came into force is illegal, and can give the plaintiff no right to claim the property of Lacha by inheritance. In this view it is not necessary to consider the second objection to the validity of the adoption. Both appeals must, therefore, be allowed with costs and the plaintiff's suit dismissed with costs.

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**21 M. 231.**

## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.*

LOBO (*Defendant*), *Appellant* v. BRITO (*Plaintiff*), *Respondent*.*

[22nd September, 1897.]

*Specific Relief Act—Act I of* 1877, *Section* 42—*Benami purchase by a Government officer prohibited from acquiring land—Suit for declaration against benamidar.*

The plaintiff sued for declaration of his title to certain land which had been purchased by him in the name of the defendant. The object of the transaction was to conceal from the Collector the fact that the plaintiff, who was a Tahsildar, had acquired property in his taluk contrary to the rules of his department.

*Held*, that the plaintiff was entitled to the declaration sought.

[R., 33 C. 967 = 4 C.L.J. 22 = 10 C.W.N. 650.]

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* Appeal No. 134 of 1896.

APPEAL against the decree of U. Achutan Nayar, Acting Subordinate Judge of South Canara, in original suit No. 33 of 1895.

The plaintiff sued for a declaration of his title to certain land. The title-deeds of the land stood in the name of the defendant, but it had, in fact, been acquired by the plaintiff who was a Tahsildar and as such prohibited, by the order of Government, from acquiring property within his taluk either in his own name or in the [232] name of others *benami* for him. The Subordinate Judge passed a decree for declaration as prayed.

The defendant preferred this appeal.

*Sankaran Nayar*, for appellant.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*) and *Ayya Ayyar*, for respondent.

## JUDGMENT.

It is contended that because the plaintiff acquired the property in the defendant's name for the purpose of concealing it from Government, he being an official of Government, who was not authorized to acquire land, the plaintiff cannot recover possession of it from the defendant or obtain any relief in respect of it. We are unable to accept this view. No doubt the plaintiff intended to conceal the acquisition of the land from the authorities and acted dishonestly and in contravention of the rules of his department. But we do not think he can be said to have acted illegally so as to bring the case within the principle that a man is precluded from obtaining relief in respect of a transaction, the purpose of which was illegal and has been accomplished. As to the question whether a declaratory suit lay, we are of opinion that the Judge is right. The defendant never asserted he was in possession and the finding is that he was not.

We dismiss the appeal without costs, as also the memorandum of objections.

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**21 M. 232.**

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

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SRINIVASA CHARLU (*Plaintiff*), *Petitioner v.*
BALAJI RAU AND OTHERS (*Defendants*), *Respondents.**
[13th October, 1896.]

*Presidency Small Cause Courts Act—Act XV of* 1882, *Section* 37—*Amendment Act—Act I of* 1895, *Section* 13—*Powers of Full Bench—Appeal.*

Act I of 1895, Section 13, does not empower the Full Bench of the Presidency Court of Small Causes to entertain appeals of questions of fact against the decree of one of the Judges of the Court.

[R., 23 B. 414 (426); 27 B. 563 ; 31 M. 490=18 M.L.J. 480=4 M.L.T. 283.]

[233] PETITION under Civil Procedure Code, Section 622, praying the High Court to revise the order of the Full Bench of the Presidency Court of Small Causes in small cause suit No. 544 of 1896.

The petitioner was the plaintiff in the suit. The suit was dismissed and he made an application to the Full Bench on the ground that the

* Civil Revision Petition No. 375 of 1896.

1896 OCT. 13. — APPELLATE CIVIL. — 21 M. 232.

evidence had been wrongly appreciated. The Full Bench declined to entertain the application and dismissed it. The grounds of his present petition were, *inter alia*, the following :—

"(1) The Full Bench of the Presidency Court of Small Causes has failed to exercise jurisdiction vested in it by law.

"(2) The Full Bench erred in dismissing the plaintiff's appeal to it.

"(3) The Full Bench ought to have held that, under the amended Presidency Small Cause Courts' Act I of 1895, an appeal is allowed to the Full Bench on questions of fact and law.

"(4) The Small Cause Judge having admittedly not acted upon the defendants' accounts, no valid reasons have been assigned for not accepting the payment of the 100 rupees in July 1893 as proved by the plaintiff's witnesses."

*Ranga Rau*, for petitioner.

Respondents were not represented.

## JUDGMENT.

It is urged before us that the ruling of this Court in *Sadasook Gambir Chund* v. *Kannayya* (1) with regard to the powers of the Full Bench of the Presidency Small Cause Court to revise a decree of a single Judge or order a new trial under Section 37 of Act XV of 1882 as it stood before amendment, is inapplicable since the amendment of the Act by Section 13 of Act I of 1895.

We are unable to find any ground whatever for this contention. The alterations relied on are two in number. The first is merely an alteration in the title of the chapter. It is now entitled "new trials and appeals" instead of "new trials and rehearing."

The change is intended merely to express more fully the subject of chapter, for it contains the very important provision that "every decree and order of the Small Cause Court in a suit shall be final and conclusive:" in other words, that no appeal [234] shall lie. It is futile to argue that, because the word "appeals" appears in the title of the chapter, it must therefore allow appeals, notwithstanding the express words of Section 37.

The second alteration is that in the present Section 38, the words "where a suit has been contested" are introduced before the provisions which relate to the cases in which a new trial or revision may be allowed. The effect of this addition is to restrict, not to extend, the powers given in the section. Under the unamended law those powers might have been exercised in any proper case without regard to the question whether the suit was contested or uncontested. Under the amended law those powers can only be exercised in contested cases. In other respects, the terms of the section remain exactly as they were before.

Thus the effect of the recent alteration is not to extend the powers of revision, as urged by the appellant, but, on the contrary, to limit them to contested cases. The limitations on those powers, which were shown in the ruling of this Court in the case above referred to, remain unaffected by the recent change in the law, and in addition there is now imposed this further limitation, *viz.*, that the powers shall not be exercised at all in cases that have not been contested.

There is thus no ground for our interference with the order of the Full Bench of the Small Cause Court.

We dismiss this petition.

(1) 19 M. 96.

21 M. 234.

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OCT. 28.

APPELLATE CIVIL.

21 M. 234.

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.*

CHINNASAMI PILLAI (*Plaintiff*), *Appellant v.* KARUPPA UDAYAN AND OTHERS (*Defendants Nos.* 1 *to* 8, 10 *and* 11), *Respondents.**
[28th October, 1896.]

*Civil Procedure Code—Act XIV of* 1882, *Section* 2—*Suits Valuation Act—Act VII of* 1887, *Section* 8—*Suit for partiion—Order by Appellate Court directing that the plaint be returned—Appeal against such order—Amendment of memorandum of appeal.*

The plaintiff sued in the Court of the District Munsif to recover his share of family property. The amount of the property exceeded, but the amount of the [235] share claimed was within the pecuniary limit of the jurisdiction of the District Munsif who passed a decree for the plaintiff. On appeal it was held that the suit was not within the jurisdiction of the Court. The decree accordingly was reversed and it was ordered that the plaint be returned for presentation to the proper Court. The plaintiff preferred this second appeal to the High Court.

*Held*, that the Lower Appellate Court had not passed a decree within the meaning of the Civil Procedure Code, Section 2, and that plaintiff's remedy was not by way of a second appeal but he should have proceeded under Civil Procedure Code, Section 588.

The petition of appeal having been allowed to be amended in accordance with this ruling:

*Held*, that the Court of First Instance had jurisdiction to entertain the suit.

[F., 25 A. 174=A.W.N. (1903) 222 (F.B.); 59 P.R. 1899=P.L.R. (1900) 137; R., 31 C. 344; 13 C.P.L R 9 (11); 15 C.P.L.R. 120; 13 Ind Cas. 903=11 M.L.T. 155 =(1912) M.W.N. 199 (200).]

SECOND appeal against the decree of T. Ramachandra Rau, Subordinate Judge of Trichinopoly, in appeal suit No. 50 of 1893, reversing the decree of T. M. Rangachari, District Munsif of Trichinopoly, in original suit No. 99 of 1891.

The plaintiff sued for partition and possession of a one-fifth share of the family property worth Rs. 228-5-10 for recovery of his share of the profits for the three years preceding the suit, namely, Rs. 475-0-9, being one-fifth of Rs. 2,375-3-9. The District Munsif passed a decree for the plaintiff disallowing, however, thirteen of the items claimed. The Subordinate Judge, being of opinion that, as the value of the whole property was more than Rs. 2,500, the District Munsif had no jurisdiction, reversed the decree, on the authority of *Vydinatha* v. *Subramanya*, (1). He accordingly directed the District Munsif to return the plaint to the plaintiff for presentation to the proper Court.

The plaintiff preferred this second appeal.

*Pattabhirama Ayyar*, for appellant.

*Sundara Ayyar*, for respondents Nos. 1 to 5.

## JUDGMENT.

On behalf of the respondent, it is objected that no second appeal lies in this case, inasmuch as the decision of the Subordinate Judge appealed against was not an adjudication, upon the right claimed or the defence set up, falling under Section 2 of the Civil Procedure Code and therefore

* Appeal against Order No. 184 of 1895.

(1) 8 M. 235.

1896 OCT. 28. — APPELLATE CIVIL. — 21 M. 234.

not a 'decree,' but that it was an 'order' directing the return of the plaint and therefore the appeal should have been preferred under Section 588 of the Civil Procedure Code.

We think this contention is well founded and we are unable to agree with the view taken in *Bindeshri Chaubey* v. *Nandu* (1).

[236] However, the case is one in which all that is required to be done to put matters right is a mere formal amendment in the petition of appeal, which we allow the appellant to make.

Now as to the Subordinate Judge's order itself, it is clearly wrong. In a case like this, whether it falls under Section 8 of the Suits Valuation Act, or under Section 14 of Act III of 1873 the value for the computation of Court-fees and that for the purpose of jurisdiction are the same, *viz.*, the value of the share claimed by the plaintiff. The District Munsif had jurisdiction to try the suit inasmuch as the value of such share was less than Rs. 2,500.

The order of the Subordinate Judge is set aside. The case should be restored to the file and dealt with according to law. We allow the appeal, but in the circumstances, without costs.

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21 M. 236.

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.*

RAJAH ESWARA DOSS (*Defendant*), *Appellant v.* VENKATAROYER (*Plaintiff*), *Respondent.** [26th August, 1897.]

*Civil Procedure Code—Act* XIV *of* 1882, *Section* 43—*Rent Recovery Act* (*Madras*)—*Act VIII of* 1865, *Section* 18—*Suit by a landlord in the Court of the District Munsif for arrears of rent for two years—Subsequent attachment for rent of a third year accrued due at date of suit.*

A zemindar brought a suit in the District Munsif's Court to recover from a tenant on his estate the arrears of rent for two years. Rent for the third year was also due. No claim for it was included in the suit, but the landlord attached the land by summary process under the Rent Recovery Act to recover it. The tenants sued in the Revenue Court under the Rent Recovery Act to have the attachment set aside as illegal:

*Held*, that the zemindar was not precluded by Civil Procedure Code, Section 43, from pursuing his remedies under the Rent Recovery Act and that the attachment was not illegal.

[R., 14 C.L.J. 589 (597) = 10 Ind. Cas. 406.]

SECOND appeal against the decree of S. Russell, District Judge of Chingleput, in appeal suit No. 55 of 1896, affirming the decision of M. Tillanayakam Pillai, Deputy Collector of Chingleput, in summary suit No. 87 of 1895.

[237] The defendant was a zemindar and the plaintiffs were tenants on his estate and they brought these suits under the Rent Recovery Act by way of appeal from the attachment of their land for arrears of rent for fasli 1303. It appeared that after these arrears had accrued due, the zemindar had sued his tenants in the District Munsif's Court for the arrears of rent for the two previous faslis. In the present cases the Deputy Collector held that the landlord was prevented by the provisions of Civil Procedure Code, Section 43, from recovering the rent for fasli

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* Second Appeals Nos. 68 to 71 of 1897.

(1) 3 A. 456.

1303 by summary process, and he accordingly declared the attachment to be illegal and directed that it be cancelled. The District Judge on appeal affirmed this decision, referring to *Taruk Chunder Mookerjee* v. *Panchu Mohini Debya*(1) and *Madho Prakash Singh* v. *Murli Manohar* (2).

1897 AUG. 26. — APPELLATE CIVIL. — 21 M. 236.

The defendant preferred this second appeal.

Mr. *N. Subramaniam*, for appellant.

*Narayana Ayyangar*, for respondent.

JUDGMENT.

Though by Section 43, Code of Civil Procedure, the landlord in circumstances such as these is precluded from suing for rent not included in his previous suit, this does not preclude him from adopting any other remedy the law gives him to enable him to recover his rent, as for instance by distraint under the Rent Recovery Act.

We must, therefore, reverse the decree of both the Lower Courts and dismiss the plaintiff's suit with costs throughout.

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**21 M. 237 = 2 Weir 312.**

## APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Benson.*

ADIKKAN (*Accused No.* 1), *Petitioner v.* ALAGAN AND OTHERS (*Complainant and Prosecution Witnesses*) *Respondents.**
[1st November, 1897.]

*Criminal Procedure Code—Act X of* 1882, *Sections* 211, 217 *and* 560.

A Magistrate, in acquitting a person accused on a charge of theft which he found to be false and malicious, awarded compensation to each of them to be [238] paid by the complainant. Subsequently one of the accused applied for and obtained sanction to prosecute the complainant for bringing a false charge under Penal Code, Section 211, and certain of his witnesses for the offence of giving false evidence under Section 193:

*Held*, that the order granting sanction was not illegal as regards the complainant by reason of the previous award of compensation.

[F., 37 B. 376 (379) = 2 Bom. Cr. Cas. 5 (8) = 15 Bom. L.R. 49 = 14 Cr. L.J. 75 = 18 Ind. Cas. 411; 15 C.P.L.R. 194 (195); R., 26 A. 512 (513) = 1 A.L.J. 234 = A.W.N. (1904) 116; 27 M. 59 (60); 18 P.R. 1901 Cr. = 100 P.L.R. 1901.]

PETITION under Criminal Procedure Code, Sections 435 and 439 praying the High Court to revise the order of E. L. Thornton, Head Assistant Magistrate of Madura, in miscellaneous case No. 17 of 1897 by which he revoked the sanction for the prosecution of the complainant and the witnesses for the prosecution in calendar case No. 188 of 1896 granted by S. Muthusundaram Ayyar, Second-class Magistrate of Tirupatur.

This was a case of theft which was found to be false and malicious; the Second-class Magistrate acquitted the accused, and awarded Rs. 50 to each of the accused as compensation to be paid by the complainant. The first accused then applied for sanction to prosecute the complainant and some of his witnesses under Penal Code, Sections 193 and 211. The Second-class Magistrate granted the sanction. The Head Assistant Magistrate revoked the sanction so far as the complainant was concerned

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* Criminal Revision Case No. 345 of 1897.

(1) 6 C. 791. (2) 5 A. 406.

1897 Nov. 1. — APPELLATE CRIMINAL. — 21 M. 237 = 2 Weir 312.

on the ground that he had already been ordered to pay compensation in the case alleged to have been brought knowing it to be false. He referred to Weir's Criminal Rulings in which it is stated that the High Court held in 1867 that an award under Section 270 of the Criminal Procedure Code would not bar a proceeding against a complainant under Section 211, but he based his decision on *Shib Nath Chong* v. *Sarat Chunder Sarkar* (1) observing that that case was more recent and found a place among the reported decisions.

*V. Krishnasmi Ayyar*, for petitioner.

*Sundara Ayyar*, for respondents.

JUDGMENT.

We cannot concur in the view of the law taken by the Head Assistant Magistrate. He relies on *Shib Nath Chong* v. *Sarat Chunder Sarkar* (1). That case is not on all fours with the present case; but even if it were, we should, with great respect for the learned Judges who decided it, feel bound to dissent from its conclusions. We do not think that there is any thing in the terms of Section 560, Criminal Procedure Code, to justify the conclusion that a Magistrate who grants sanction to prosecute for offences [239] punishable under Sections 211 and 193, Indian Penal Code, is *ipso facto* debarred from also granting compensation under Section 560, Criminal Procedure Code, to the person falsely accused. The sanction to prosecute for making a false charge is granted on grounds of public policy for an offence against public justice. The compensation is granted partly in order to deter complainants from making vexatious and frivolous complaints, and partly in order to compensate the accused for the trouble and expense to which he has been put by reason of the false complaint. We can see no ground in law or reason why compensation should not be granted in a case in which the Magistrate also directs a prosecution for making a false charge. The case (*Queen* v. *Rupan Rai* (2)) relied on by the learned Judges appears to us to be an authority directly opposed to their conclusion.

However that may be, the interpretation of the law by this Court to which the Magistrate refers is clear and is opposed to the view recently taken by the Calcutta High Court. The Magistrate is bound to take the law as it is laid down by this Court, and ought not to rely on the decision of another High Court when it is opposed to the decision of this Court.

We set aside the order of the Head Assistant Magistrate and affirm that of the Second-class Magistrate.

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(1) 22 C. 586. (2) 6 B.L.R. 296.

21 M. 239=8 M.L.J. 165.

1897 Nov. 12. — APPELLATE CIVIL. — 21 M. 239=8 M.L.J. 165.

## APPELLATE CIVIL.

*Before Mr. Justice Davies and Mr. Justice Boddam.*

KARUPPANAN AMBALAM (*Plaintiff*) v. RAMASAMI CHETTI (*Defendant*).* [12th November, 1897.]

*Provincial Small Cause Courts' Act—Act IX of* 1887, *Schedule II, Article* 35—*Suit for compensation for illegal attachment—Suit to recover money paid in excess.*

The plaintiff sued to recover from his landlord a sum which the defendant had collected in excess of what was properly due to him by distraint of the plaintiff's cattle:

*Held*, that the suit was cognizable by the Small Cause Court.

[R., 30 M. 41=1 M.L.T. 414.]

CASE stated under Civil Procedure Code, Section 646, by S. Russell, District Judge of Madura, in original suit No. 431 of 1897.

[240] The case was stated as follows :—

"Under the provisions of Section 646-B of the Code of Civil Procedure, I have the honour to submit, for the orders of the High Court, the records in original suit No. 431 of 1897 on the file of the District Munsif of Sivaganga (small cause No. 400 of 1897, East Subordinate Court, Madura), as the District Munsif has failed to exercise a jurisdiction vested in him by law.

"The plaintiff in the suit is the tenant and the defendant is the landlord. Plaintiff sues to recover from the defendant a sum of Rs. 138-10-5, which the defendant has collected in excess of what is properly due to him upon demand and distraint of plaintiff's cattle.

"The suit was originally filed in the East Subordinate Court, Madura, on the small cause side in small cause No. 400 of 1897. The Subordinate Judge returned the plaint for presentation to proper Court, holding that it was not triable by the Court of Small Causes under Article 35, Clause (*j*), of second schedule to Act IX of 1887. Secondly, the plaint was presented in the District Munsif's Court of Sivaganga, where it was filed as original suit No. 431 of 1897. The District Munsif in his turn returned the plaint for presentation to proper Court, holding that the suit was a suit for money and not triable on the original side—*vide Raghumoni Audhikary* v. *Nilmoni Singh Deo* (1).

"I am of opinion that the case should be entertained on the original side, as there has been alleged excessive distraint under Article 35, Clause (*j*), of second schedule to Act IX of 1887."

The plaintiff was not represented.

*V. Krishnasami Ayyar*, for defendant.

## JUDGMENT.

The suit was to recover back money paid in excess of the amount due under pressure. It was not a suit to recover compensation for illegal, improper or excessive distress or attachment within the meaning of Article 35, Clause (*j*), of the second schedule of the Provincial Small Cause Courts' Act of 1887. This had been held to apply only to cases

* Referred Case No. 27 of 1897.

(1) 2 C. 393.

1897 Nov. 12. — APPELLATE CIVIL.

where the suit is brought to recover damages for the tort (*Dewan Roy* v. *Sundar Tewary* (1)) and not for money paid in excess, and with this ruling we agree. The suit is, therefore, one cognizable by a Court of Small Causes as the Munsif held.

21 M. 239 = 8 M.L.J. 165.

21 M. 241.

## [241] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

SANKARA AYYAR AND ANOTHER (*Petitioners in Referred Case No.* 21 *of* 1897) *v.* NAINAR MOOPPANAR AND OTHERS (*Petitioners in Referred Case No.* 22 *of* 1897).* [6th December, 1897.]

*Succession Certificate Act—Act VII of* 1889, *Section* 14—*Refund of deposit.*

If an application for a succession certificate is granted, the sum deposited by the applicant cannot be refunded; but if no order for the grant of the certificate has been made, a refund can take place.

CASES stated under Succession Certificate Act, 1889, Section 19, by R. D. Broadfoot, District Judge of Tinnevelly.

The cases were stated as follows :—

"In cases of succession certificates the applicants, to whom the Court has ordered the issue of the certificates with or without security, apply occasionally for the refund of the deposit made by them under Section 14 (1) of the Succession Certificate Act VII of 1889, on the ground that the applicant is unable to furnish the required security, or that the necessity for obtaining a certificate has ceased.

"I am of opinion that, possibly in the former case, the applicant may be entitled to a refund, but not in the latter. At first I thought that refund should not be granted after the matter has been decided in open Court. Petitioner's vakil urges that, until the certificate is signed, the application may be withdrawn.

"Two applications for refund of the kind (miscellaneous petitions Nos. 283 and 299 of 1897) are now pending before me. It appears to me that a refusal by me to return the deposit is not subject to appeal and may cause hardship to the party if my view is mistaken.

"I, therefore, refer the question, at the request of the applicants' pleaders, up to what stage in the proceedings is an applicant entitled to obtain a refund ?"

The parties were not represented.

### JUDGMENT.

[242] We are of opinion that Clauses 2 and 3 of Section 14 of the Act must be read together. If the application is allowed, *i.e.*, if the order for the grant of a certificate has been made, the sum in deposit becomes at once legally appropriated, as duty, to the extent of the debt covered by the order, and cannot be refunded.

In other cases we think that a refund can be made.

* Referred Cases Nos. 21 and 22 of 1897.

(1) 24 C. 163 (165.)

21 M. 242=8 M.L.J. 81.

1897
DEC. 8.

APPELLATE CIVIL.

21 M. 242=8 M.L.J. 81.

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

UNICHAMAN (*Plaintiff*), *Petitioner v.* AHMED KUTTI KAYI AND OTHERS (*Defendants*), *Respondents.** [8th December, 1897.]

*Limitation Act—Act XV of* 1877, *Schedule* II, *Articles* 97, 116, 120—*Transfer of Property Act—Act IV of* 1882, *Section* 68—*Suit for mortgage money by mortgagee on disturbance of possession.*

The defendants demised certain land to the plaintiff under a registered kanom deed in 1888. The plaintiff was evicted in February 1893. He now sued in 1896 to recover the amount of the kanom :

*Held*, that the period of limitation applicable to the suit was six years and that the suit was not barred by limitation.

[R., 30 A. 388=5 A.L J. 670=A.W.N. (1908) 161 ; 6 C.L J. 143=11 C.W.N. 240-N ; D., 8 O.C. 169.]

PETITION under Provincial Small Cause Courts' Act, Section 25, praying the High Court to revise the decree of J. H. Munro, Subordinate Judge of South Malabar, in small cause suit No. 182 of 1896.

The predecessor in title of the defendants demised certain land to the plaintiff under a registered kanom deed, dated 25th November 1888. The mortgagor failed to secure possession to the plaintiff who was ejected from the land on the 4th February 1893. The plaintiff now sued to recover the amount of the kanom, less certain arrears of rent due by the plaintiff to the defendants. The Subordinate Judge held that the suit was barred by limitation under Limitation Act, Schedule II, Article 97, and accordingly dismissed the suit.

The plaintiff preferred this petition.

**[243]** Mr. *C. Krishnan*, for petitioner.

*Ryru Nambiar*, for respondents.

JUDGMENT.

We think that the Subordinate Judge was wrong in holding that the suit was barred under Article 97, Schedule II, of the Limitation Act. The claim is for money lent on a usufructuary mortgage, the cause of action being the failure of the mortgagor to secure the mortgagee in possession. The liability to secure the mortgagee in possession, or, in default to repay the mortgage money, is not a liability arising under the common law on the ground of failure of consideration, but is a liability imposed by Section 68 of the Transfer of Property Act. If this liability be taken to be one arising under a covenant implied by law as incidental to the mortgage contract (which was in writing and registered) then Article 116 of the Limitation Act would apply. Otherwise the appropriate Article is 120, the case not being otherwise provided for. In either view the suit is not barred, since it was brought within six years from the time when the cause of action accrued. The case *Sawaba Khandapa* v. *Abaji Jotirav* (1) is distinguishable from the present by the fact that when it was decided the Transfer of Property Act was not in force in Bombay. We, therefore, reverse the decree of the Lower Court, and remand the suit for disposal on the merits. Costs will abide and follow the result.

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* Civil Revision Petition No. 47 of 1897.

(1) 11 B. 475.

1897
DEC. 8.

APPELLATE CIVIL.

21 M. 243.

21 M. 243.

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

VENKATAGIRI RAJAH (*Plaintiff*), *Petitioner v.* VENKAT RAU (*Defendant*), *Respondent.* [8th December, 1897.]

*Provincial Small Cause Courts' Act—Act—IX of* 1887, *Schedule* II, *Articles* 11 *and* 13—*Suit for jodi.*

A suit for arrears of jodi, is maintainable as a small cause suit under Provincial Small Cause Courts' Act, 1887.

PETITION under Provincial Small Cause Courts' Act, Section 25, praying the High Court to revise the order of T. M. Rangachari, **[244]** District Munsif of Nellore, in small cause suit No. 679 of 1896.

The plaintiff was a zemindar and the defendant was entitled to three-fourths share in a certain agraharam on his estate. The plaint set out that customary jodi payable by the defendant to the plaintiff had fallen into arrears and the suit was filed on the small cause side of the Court to recover the arrears. It was objected on the part of the defendant that the suit was not maintainable as a small cause suit and reference was made to the Provincial Small Cause Courts' Act, 1887, Schedule II, Articles 11 and 13, and *Cumara Venkatachala Reddiar* v. *Narayana Reddy* (1) and *Subramanian Chetti* v. *The Prince of Arcot* (2).

The District Munsif upheld this objection and returned the plaint.

The plaintiff preferred this petition.

*Desikachariar*, for petitioner.

Respondent was not represented.

## JUDGMENT.

We do not agree with the District Munsif in holding that "jodi" is a cess or due of the kind referred to in Schedule II, Article 13 of the Provincial Small Cause Courts' Act. The general word "dues" in that article must be taken to be dues similar in kind to the special dues mentioned in the article. In the present case the claim is for "jodi" which is rent on favourable terms. Article 11 of Schedule II has no application whatever.

The claim was, therefore, cognizable by the Small Clause Court.

We set aside the order and direct the District Munsif to receive the plaint and dispose of it according to law. Costs will abide and follow the result.

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* Civil Revision Petition No. 74 of 1897.

(1) 4 M.H.C.R. 393. (2) 2 M. 146.

21 M. 245.

1897 DEC. 15. APPELLATE CIVIL. 21 M. 245.

## [245] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar, and Mr. Justice Benson.*

KRISHNAYYAR, (*Plaintiff*) v. SOUNDARARAJA AYYANGAR, (*Defendant*).* [15th December, 1897.]

*Provincial Small Cause Courts' Act—Act IX of* 1887, *Schedule II, article* 18—*Suit by temple manager against his predecessor for damage sustained by temple.*

A suit by the manager of a temple against his predecessor in office for damages sustained by the temple owing to the negligence of the defendant is not cognizable by a Court of Small Causes.

[R., 33 M. 494 (497) = 5 Ind. Cas. 912 = 20 M.L.J. 146 = 8 M L.T. 67.]

CASE stated under Civil Procedure Code, Section 616, by S. Russell, District Judge of Madura, in small cause suit No. 1315 of 1896.

The case was stated as follows :—

" Under the provisions of Section 646-B of the Code of Civil Procedure, I have the honour to submit, for the orders of the High Court, the records in small cause suit No. 1315 of 1896, on the file of the Subordinate Court of Madura (West) (original suit No. 109 of 1897 on the file of the District Munsif of Madura), as the Subordinate Judge has failed to exercise a jurisdiction vested in him by law.

" The plaintiff in the suit is the present manager of the Kalla Alagar devastanam, and the defendant is the late manager. Plaintiff sues to recover from the defendant a sum of Rs. 87-8-7, being the amount of damages which the devastanam had sustained by the defendant's negligence in not prosecuting certain suits which he had instituted on behalf of the devastanam while he was acting manager.

" The suit was originally filed in the West Subordinate Court (Madura) on the Small Cause side in small cause No. 1315 of 1896. The Subordinate Judge returned the plaint for presentation to a proper Court, holding that the suit is one relating to a trust and as such, is not cognizable by the Small Cause Court—*vide* Article 18 of second schedule to Act IX of 1877. Secondly, the plaint was presented in the District Munsif's Court of Madura, where it was filed as original suit No. 109 of 1897. The **[246]** District Munsif, in his turn, returned the plaint for presentation to proper Court, holding that the suit is not one relating to trust, and as such, is cognizable by the Court of Small Causes.

"I am of opinion that the suit is of a small cause nature, and the Subordinate Judge was wrong in having returned the plaint."

The parties were not represented.

### JUDGMENT.

A person like the defendant in the present case holding the office of manager of a temple, though he possesses no hereditary right and is subject to the superintendence of a committee appointed under Act XX of 1863, has been held to be a trustee (*Sethu* v. *Subramanya*(1)). A claim against such a person for damages said to have been caused by his neglect in the discharge of his duties as manager must, therefore, be held to be a suit

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* Referred Case No. 28 of 1897.

(1) 11 M. 274 (277).

1897 DEC. 15. — APPELLATE CIVIL. — 21 M. 246.

relating to a trust falling under Article 19 of the Provincial Small Cause Courts' Act.

The answer to the question submitted is that the suit is not cognizable by a Small Cause Court.

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**21 M. 246 = 1 Weir 751 = 2 Weir 17.**

## APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Subramania Ayyar.*

KARUPPANA NADAN (*Accused*), *Petitioner v.* CHAIRMAN, MADURA MUNICIPALITY (*Complainant*), *Respondent.**
[13th January, 1898.]

*Criminal Procedure Code—Act* X *of* 1882, *Sections* 16, 350—*Bench of Magistrates—District Municipalities Act* (*Madras*)—*Act* IV *of* 1884, *Sections* 263, 264.

A trial on the charge of making an encroachment upon public land under District Municipalities Act (Madras), 1884, Sections 167, 263 and 264, was begun before a Bench of seven Magistrates, and ended in a conviction by five of the Magistrates in the absence of the other two. It appeared that the Municipal Council had passed no resolution under District Municipalities Act, Section 264 : *Held*, that on the facts of the case the conviction under Section 263 was right, and that it was not invalidated by the absence at the end of the trial of two of the Magistrates before whom it had begun.

**[247]** *Quære :* Whether a charge under Section 264, would lie in the absence of a resolution passed by the Municipal Council.

[R., 3 N.L R. 67 (69).]

CASE referred for the orders of the High Court under Criminal Procedure Code, Section 438, by J. Twigg, District Magistrate of Madura, in register case No. 1414 of 1897.

The accused was convicted by a Bench of Magistrates of the offence of encroachment upon public land under District Municipalities Act IV of 1884, Sections 167, 263 and 264, and was sentenced to pay a fine. On appeal the Deputy Magistrate reversed the conviction on the ground that the notice issued by the chairman of the Municipal Council was unauthorized by the council, and that the prosecution was not instituted by the council, and that only five of the seven Magistrates pronounced judgment in the case. The District Magistrate in referring the case submitted the following memorandum :—

"In summary trial No. 10299 of 1896, the Madura Bench Magistrates convicted accused under Sections 167, 263 and 264 of Act IV of 1884.

"In appeal the Deputy Magistrate, Melur Division, reversed the finding on the grounds—

(*a*) that the notice said to have been disobeyed was issued by the chairman, and there was nothing to show that he had been authorized by the council to issue it ;

(*b*) that the prosecution was instituted by the chairman and not by the council ;

(*c*) that only five of the seven Magistrates who constituted the Bench for the trial of the case pronounced judgment.

"As to (*a*) the Appellate Court might have called for the evidence which would no doubt have been forthcoming. The point only comes in

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* Criminal Revision Case No. 509 of 1897.

question with reference to the conviction under Section 264. (b) It is submitted that a complaint may be laid by any one acquainted with the facts, and that so far as the Court is concerned it is immaterial whether the complaint was lodged by direction of the council or not. (c) As the five Magistrates who joined in pronouncing judgment had been present throughout the case, it is submitted that their decision is not rendered invalid by the fact that two other Magistrates who had sat during the case did not join in the judgment."

1898 JAN 13. — APPELLATE CRIMINAL. — 21 M. 246 = 1 Weir 751 = 2 Weir 17.

Together with the memorandum of the District Magistrate was submitted a letter to him by the Deputy Magistrate in which [248] he said :—" I, however, with reference to the points adverted to in your memorandum, beg to submit a further explanation as follows :—(a) it is appellant's contention that the conviction was illegal, because the notice was issued by the chairman instead of by the council contrary to law. While Section 264 of Act IV of 1884 provides for punishment for non-compliance with notice, Sections 167 and 263 of the Act require that such notice should be given by the council and not by the chairman. The question, therefore, has an important bearing on the conviction. In the present case the notice was issued by the chairman independently of the council, as is apparent from the chairman's endorsement order under date the 3rd October 1896 on the Sanitary Inspector's report, and the notice signed by him under date the 14th idem. The sanitary Inspector who represented the prosecution also admitted the fact. The question as to the illegality of the notice was duly raised in the Lower Court as well. (b) In the present case, the prosecution was ordered by the chairman, and that, for offences falling under Sections 167, 263 and 264 of the Municipal Act IV of 1884. Sections 280 and 287 of the Act are clear that the council, and not the chairman, should direct the prosecution in such cases. The case in point does not seem to fall under the general rule that any person acquainted with the facts of a case can set the law in motion by a complaint. It is, rather, an exception to the general rule, created by statute—*vide* the decision of the Bombay High Court in *In re Ganesh Narayan Sathe* (1).

The principle has been re-enunciated also by the Allahabad High Court—*vide* penultimate clause of their decision in *Farzand Ali* v. *Hanuman Prasad* (2). (c) In regard to this point, I beg to submit that not only two of the Magistrates who had sat during the first hearing, did not join in judgment, but only two out of the five Magistrates who joined in judgment had made local inspection, which was, of course, part of the enquiry and must have influenced and guided the decision of the case."

*Rangachariar*, for complainant.

Accused was not represented.

## JUDGMENT.

It is not quite necessary to consider whether in the absence of a resolution passed by the Municipal Council the [249] accused could have been proceeded against under Section 264 of the District Municipalities Act, 1884. The accused was clearly punishable under Section 263 if as alleged he erected the fence in the lane without the license required by the law. The circumstance that two out of the seven Magistrates (who constituted the Bench that sat during part of the trial) did not attend on the day when the accused was convicted by the five Magistrates who were present

(1) 13 B. 600. (2) 18 A. 465 (469).

1898 JAN. 18. — APPELLATE CRIMINAL. — 21 M. 246 = 1 Weir 751 = 2 Weir 17.

then does not affect the legality of the conviction. The cases of *Hardwar Sing* v. *Khega Ojha* (1) and *Damri Thakur* v. *Bhowani Sahoo* (2) are clearly distinguishable inasmuch as in the present case the Magistrates who decided it had attended throughout the trial. We must, therefore, set aside the order of the Deputy Magistrate acquitting the accused and direct the Magistrate to rehear the appeal and dispose of it according to law.

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21 M. 249 = 1 Weir 42 & 310.

## APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.*

QUEEN-EMPRESS *v.* SUBBA NAIK AND OTHERS.*
[11th and 23rd March, 1898.]

*Penal Code—Act XLV of* 1860, *Sections* 302, 304 *and* 324—*Good faith—Order of superior officer—Firing on an unlawful assembly.*

A caused crops to be sown on land, as to the enjoyment of which there was a dispute between her and B. Persons having proceeded to reap the crops on behalf of B, the servants of A went to the place with the station-house officer and some constables who were armed. The station-house officer ordered the reapers to leave off reaping and to disperse, but they did not do so; he then told one of the constables to fire, and he fired into the air. Some of the reapers remained and assumed a defiant attitude. The station-house officer, without attempting to make any arrests and without warning the reapers that, if they did not desist from reaping, they would be fired at, gave orders to shoot, and one of the constables fired and mortally wounded one of the reapers. It was found that neither the station-house officer nor the last-mentioned constable believed that it was necessary for the public security to disperse the reapers by firing on them:

[250] *Held*, that the station-house officer and the constable were not acting in good faith and that the order to shoot was illegal and did not justify the constable and that both he and the station-house officer were guilty of murder.

PETITION preferred on behalf of Government under Criminal Procedure Code, Sections 435 and 439, praying the High Court to revise the sentences passed on the prisoners in calendar case No. 47 of 1897 on the file of the Sessions Court of Tinnevelly.

The facts of the case appear sufficiently for the purposes of this report from the following judgment of the High Court.

The Public Prosecutor (Mr. *E. B. Powell*), for the Crown.

Prisoner, No. 1, was not represented.

*Vaidinada Ayyar*, for prisoner No. 2.

*Ramakistna Ayyar*, for prisoner No. 3.

### JUDGMENT.

This is a petition presented by the Public Prosecutor on behalf of the Government to revise the sentences passed by the Sessions Judge of Tinnevelly on the three accused on the ground that the sentences are inadequate. The first prisoner was an acting station-house officer, the second prisoner is a constable, and the third prisoner is a private kavalgar. The first and second prisoners were charged with culpable homicide amounting to murder under Section 302, Indian Penal Code, but were

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* Criminal Revision Case No. 351 of 1897.

(1) 20 C. 870. (2) 23 C. 194.

convicted under Section 304 of the Code, the third prisoner was charged with voluntarily causing hurt with a dangerous weapon under Section 324, Indian Penal Code, but was convicted under Section 323. The first prisoner was sentenced to one year's rigorous imprisonment, the second prisoner to imprisonment until the rising of the Court, and the third prisoner to two months' rigorous imprisonment. The prisoners have not appealed against their conviction.

1898 MARCH 23. — APPELLATE CRIMINAL. — 21 M 249 = 1 Weir 42 & 310.

The facts of the case as found by the Sessions Judge are as follows:—There was a dispute between two co-widows about the enjoyment of a certain field. On the 18th January 1897 the first and third prosecution witnesses (one Sankaralinga Tevan whose death was the subject of enquiry and some coolies) went to the field in question and began to reap the crop on behalf of the junior widow. The Sessions Judge believes that the balance of evidence is that the crop was sown by the senior widow. Soon after the reaping began about midday, three Vellalas of the faction of the senior widow together with the first and second prisoners and another constable, each constable being armed with a gun and accompained by the kavalgar of the senior widow, appeared on the [251] scene. The first prisoner ordered the reapers to desist, and the first prosecution witness declined to obey and the point was argued, as the Sessions Judge says, with some acerbity. Finding that the coolies still continued reaping, the first prisoner directed Namasivayam, one of the constables, to fire and he fired in the air. Some of the coolies then ran away, but some remained and assumed a defiant attitude. Then the head constable, first prisoner, again gave orders to shoot, the second prisoner fired and Sankaralingam fell mortally wounded; the third prisoner at the same time attacked third prosecution witness, knocked him down with a stick and stabbed him with some weapon, but the injuries inflicted were not serious. The prosecution witnesses say that the deceased was endeavouring to stop the coolies from running away and that was the reason he was shot by the second prisoner when he was directed to fire. The police rendered no aid to the wounded man, and when the Village Munsif arrived on the scene all the prisoners had gone away.

The prisoners on their trial at the Sessions set up a defence, which the Sessions Judge considered untrue, and we agree with him.

It was admitted by the prosecution that after the first prisoner had given orders to the coolies to disperse and they had neglected to do so, the assembly became an unlawful one. Assuming that it was so, and that the assembly refused to disperse, it would have been the duty of the Police to arrest the persons who appeared to be the leaders of the assembly, and see what effect that course had upon the remaining coolies, but we do not find that any attempt was made to do this. Nor was any warning given to the coolies that if they did not desist from reaping they would be fired at. It is worthy of remark that no injuries were inflicted on the Police. We have no hesitation in saying that under the circumstances above detailed both the first and second prisoners were guilty of murder. The Government, however, has not appealed against the acquittal on that charge.

We are of opinion that the accused Police officers cannot shield themselves on the plea that they were acting in good faith, for nothing is said to be done in good faith which is done without due care and attention, and we are of opinion that neither the first nor the second accused believed that it was necessary for the public security to disperse such an assembly by firing on them.

1898 MARCH 23. — APPELLATE CRIMINAL. — 21 M. 249 = 1 Weir 42 & 810.

[252] The degree of force which may be lawfully used in the suppression of an unlawful assembly depends on the nature of such assembly, for the force used must always be moderated and proportioned to the circumstances of the case and to the end to be obtained. (Lord Bowen's Report on the Colliers' Strike and Riot,—1893.)

The taking of life can only be justified by the necessity for protecting persons or property against various forms of violent crime, or by the necessity of dispersing a riotous crowd which is dangerous unless dispersed (*Keighly* v. *Bell* (1), *Rex* v. *Suddis* (2), and *Alexander Broadfoot's case*(3).

We are of opinion that the second accused is not protected in that he obeyed the orders of his superior officer. The command of the head constable cannot of itself justify his subordinate in firing if the command was illegal, for he and the head constable had the same opportunity of observing what the danger was, and judging what action the necessities of the case required. We are of opinion that the order the second accused obeyed was manifestly illegal, and the second accused must suffer the consequence of his illegal act. The revision petition of the Government, so far as it relates to the enhancement of punishment on the first and second accused, must be allowed, and we sentence R. Subba Naik, the first prisoner, to ten years' rigorous imprisonment, and the second prisoner, Sabjammiah Sahib, to seven years' rigorous imprisonment.

The third accused undoubtedly has received a lenient sentence, but in his case we do not feel ourselves compelled to interfere.

Ordered accordingly.

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21 M. 253.

## [253] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

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SURYANARAYANA SASTRI (*Plaintiff*), *Appellant v.*
RAMAMURTI PANTULU (*Defendant*), *Respondent.**
[11th and 12th October, 1897.]

*Transfer of Property Act—Act IV of* 1882, *Section* 135—*Actionable claim—Claim affirmed by a Court—Consideration for assignment—Limitation—Construction of decree.*

A, as guardian of the widow and legatee of the depositor, claimed a sum of money in the hands of a Bank, to which B asserted an adverse claim. Pending an application by A for a succession certificate, B sued the Bank and the widow for the money and A was joined as a defendant. A decree was passed in 1889 by which it was ordered that the Bank should pay the money to B on his giving security to pay it over to A on his obtaining the succession certificate. B furnished security and received the money in 1892. A meanwhile had obtained the succession certificate and in 1894 he purchased the rights of the widow who had come of age. In the same year he sued B for the money.

*Held*, that the suit was not barred by limitation and that the plaintiff was entitled to a decree; but that he could recover only the price actually paid by him with interest and the incidental expenses and costs, as the case was not within Transfer of Property Act, Section 135 (*d*), since on the true construction of the decree of 1889 all that had been decided was who should hold the money pending the settlement of the rights of the rival claimants.

APPEAL against the decree of E. C. Rawson, Acting District Judge of Vizagapatam, in original suit No. 36 of 1894.

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* Appeal No. 40 of 1897.

(1) 4 F. & F., 763 at p. 790. (2) I East, 306 at p. 312.
(3) Fosters' Crown Law, 154.

1897 Oct. 12. — Appellate Civil. — 21 M. 253.

The plaintiff sued as the assignee of one Ramamma to recover from the defendant Rs. 2,279-6-0 with interest. Ramamma was the widow of one Subbarayadu who died in 1887, leaving a will by which he bequeathed the abovementioned sum then deposited in a Bank at Vizianagaram to her, and appointed the present plaintiff Suryanarayana Sastri to be her guardian until she should come of age. Suryanarayana Sastri in his capacity of guardian of the minor widow applied for a succession certificate in 1888 to enable him to collect the money; but before it was issued Ramamurti Pantulu, the present defendant, asserted a claim to the money as assignee from the undivided brothers of the deceased and the father and natural guardian of the widow. This claim [254] not being recognised by the Bank, he instituted original suit No. 357 of 1888 on the file of the District Munsif of Vizianagaram to recover the money. In that suit, in which the plaintiff impugned the genuineness of the will, the original defendants were the Bank and the widow and the alleged assignors, and Suryanarayana Sastri was subsequently brought on to the record as sixth defendant. The District Munsif held that the Bank was justified "in withholding payment to the plaintiff not because there was any doubt "as to the minor third defendant being the widow of the late Subbara-"yadu, but because the sixth defendant also claimed the money as being "guardian to the widow under a will." But in view of the facts that no certificate had yet been issued to Suryanarayana Sastri, and that the Bank was not in a financially sound position, instead of dismissing the suit he passed a decree by which it was ordered that the Bank "do pay to "plaintiff the suit amount on condition of his giving sufficient security to "return the money to sixth defendant on his producing the certificate "from the District Court of Vizianagaram, and that the Bank on pay-"ment of money into Court be exonerated from all liability to pay the "money to any one else and that sixth defendant do look to plaintiff "for payment of the money." This decree was dated 29th April 1889, and the plaintiff having furnished the required security received the money in January and March 1892. Suryanarayana Sastri obtained the succession certificate on the 14th of February 1890. Ramamma came of age in or about 1892 and on the 14th of March 1894 she assigned her rights to him and he instituted the present suit on 6th November 1894.

The plaintiff, contended that his claim was *res judicata*, but the District Judge held that it had not been the subject of adjudication, and disposed of the case on the merits. The will was upheld, and it was found that the money was part of the testator's self-acquisitions and that the suit was not barred by limitation; that the consideration for the plaintiff's assignment was Rs. 1,450 only, and that the subject of the assignment was an actionable claim within the meaning of Transfer of Property Act, Section 135, it being impossible for the money to be recovered except by a suit. The District Judge accordingly on the authority ol *Nilakanta* v. *Krishnasami*(1) passed a decree for Rs. 1,450 and interest from the date [255] of the assignment and costs thereon and disallowed the rest of the plaintiff's claim.

The plaintiff preferred this appeal and the defendant filed a memorandum of objections.

*Ramachandra Rau Saheb*, for appellant.

*Pattabhirama Ayyar*, for respondent.

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(1) 13 M. 225.

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## JUDGMENT.

The first question for consideration is what was the price for the assignment. The Judge has found that only Rs. 1,450 was actually paid and that there was no satisfactory evidence of the payment by plaintiff either of the litigation expenses—Rs. 290—or of the sum of Rs. 1900 under the receipt Exhibit B. Notwithstanding the execution of this receipt Exhibit B by Ramamma we agree with the Judge in believing her evidence that no money was paid her on that receipt. The evidence in proof of payment is not of a credible character, and the omission of the plaintiff to state whence he procured this large sum of money indicates that he never had it. It would have been easy for him to show how he happened to get the money if he really did get it. The payment of the Rs.1,900 is therefore not proved. As regards the Rs.290 for legal expenses, there can be no doubt that plaintiff must have spent a considerable amount of money in litigation on behalf of Ramamma. There is to begin with the stamp of Rs. 60 on the succession certificate which he obtained on her behalf and she admits that she has paid nothing to plaintiff on account of litigation expenses. The sum mentioned by plaintiff and admitted in the assignment itself, *viz.*, Rs. 290, may be accepted as correct, as it is not extravagant.

It is then contended for the plaintiff that he is entitled to recover on the assignment the whole amount mentioned therein as the consideration, even if the whole amount was not paid. If the case fell under Clause (*d*) of Section 135 of the Transfer of Property Act that would be so, but we think that in this case the claim had neither been affirmed nor was ready for affirmation by a Court, and it therefore remained an actionable claim. The decision in the suit against the Bank did not determine whether Ramamma or the defendant was entitled to the money. That was left for future determination. All that the Court then decided in reference to the money was as to who should hold the custody of it, pending the settlement of the rights of the rival claimants. We must therefore hold that the plaintiff can recover only the price he **[256]** paid and that we have found to be Rs. 290 over and above the sum allowed by the Lower Court. The decree of the Lower Court will be modified by adding this sum, and the incidental expenses attaching to the assignment, *viz.*, Rs. 46 to the amount decreed to plaintiff. The appellant and the respondent will have and pay proportionate costs in this and in the Lower Appellate Court on the amounts now allowed and disallowed. There is nothing in the memorandum of objections. We agree with the Judge as to the genuineness and validity of the will of Ramamma's husband and, as the defendant received the money within three years of suit, no question of limitation arises. The memorandum of objections is therefore dismissed with costs.

21 M. 256.

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APPELLATE CIVIL.

21 M. 256.

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.*

NARAYANA CHETTI (*Defendant*), *Petitioner v.* LAKSHMANA CHETTI (*Plaintiff*), *Respondent.** [15th and 21st October, 1897.]

*Contract Act—Act IX of* 1872, *Section* 43—*Joint promissors—Suit for money against person carrying on business of a dissolved partnership—Objection taken on ground of non joinder.*

In a suit for money due on account of dealings in clothes from 1889 to 1895, it appeared that the dealings had taken place between the plaintiff and the firm consisting of the defendant and another till 1894 when the firm was dissolved since which date the defendant had carried on the business and dealt with the plaintiff:

*Held*, that the suit was not bad for non-joinder of the late partner.

*Per cur*: it is not incumbent on a person dealing with partners to make them all defendants in a suit.

[R., 22 A. 307 (316); 33 M. 317 (320) = 5 Ind. Cas. 735 (736) = 7 M.L.T. 373 = (1910) M.W.N. 35; 15 C.P.L.R. 51.]

PETITION under Provincial Small Cause Courts Act, Section 25, praying the High Court to revise the decree of K. Ramachandra Ayyar, District Munsif of Trichinopoly, in small cause suit No. 54 of 1896.

The plaintiff sued to recover a sum due on account of dealings in clothes from March 1889 to January 1895. Up to 1894 the [257] dealings took place between the plaintiff and the firm consisting admittedly of the defendant and another. In that year the firm was admittedly dissolved, and the business was carried on by the defendant. The defendant pleaded, *inter alia*, non-joinder of his late partner. The District Munsif passed a decree for plaintiff.

The defendant preferred this petition.

*S. Subramania Ayyar*, for petitioner.

*Tirumalasami Chetti*, for respondent.

## JUDGMENT.

According to the law declared in the Contract Act, Section 43, especially when taken with Section 29 of the Civil Procedure Code, it is clear that it is not incumbent on a person dealing with partners to make them all defendants. He is at liberty to sue any one partner as he may choose. *Lukmidas Khimji* v. *Purshotam Haridas* (1).

The petition must therefore be dismissed with costs.

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* Civil Revision Petition No. 525 of 1896.

(1) 6 B. 700.

1897
OCT. 22.

APPELLATE CIVIL.

21 M. 257=
8 M.L.J. 25.

21 M. 257=8 M.L.J. 25.

## APPELLATE CIVIL.

*Before Mr. Justice Benson and Mr. Justice Boddam.*

SURYANARAYANA PANDARATHAR (*Legal Representative of deceased Counter-petitioner and Defendant No. 2*), *Appellant v.* GURUNADA PILLAI (*Petitioner and Transferee-Plaintiff*), *Respondent.** [22nd October, 1897.]

*Limitation Act—Act XV of* 1877, *Schedule II, Article* 179—*Application for execution—Continuation of previous application.*

In June 1892, an application was made for execution of a decree and it was dismissed, the applicant being relegated to a suit to establish his right. He did not sue, but in September 1892 he put in a fresh application to execute, which was dismissed. He then sued and in March 1895 a decree was passed in his favour. He now put in a petition in October 1895 praying that his petition of September 1892 be revived or continued :

*Held*, that the petition was barred by limitation.

[R., 28 M. 53=14 M.L.J. 401.]

APPEAL against the order of T. M. Horsfall, District Judge of Tanjore in civil miscellaneous appeal No. 19 of 1896, reversing the order of S. Dorasami Ayyar, District Munsif of Tanjore, in [258] execution petition No. 789 of 1895, in the matter of original suit No. 103 of 1880, on the file of the Additional District Munsif's Court of Tanjore.

The facts of the case were stated by the District Judge as follows:—

"In 1879 the late Zemindar of Gandarvakottai was sentenced to transportation for life for abetment of dacoity. On the 20th September 1880 one Seshayyangar got a decree against him (original suit No. 109 of 1880). In 1881 the Government, which had declared the estate to be forfeited to Government, released its lien thereon in favour of the zemindar's minor son, the estate being placed under the Court of Wards.

"Seshayyangar made a series of attempts to execute his decree. The first four applications were all against the minor. They are dated 17th September 1883, 17th September 1886, 25th September 1889 and 21st June 1882. All were dismissed, for reasons which are not now of any consequence.

"Seshayyangar died, and in 1892 his heir transferred the decree to one Gurunada Pillai, who is the present petitioner. On the 19th September 1892, this plaintiff put in the fifth execution petition. This time it was against the former zemindar, who was then still alive. The Court of Wards objected and the petition was again dismissed, petitioner being referred to a regular suit. Then plaintiff filed a suit (original suit No. 632 of 1892) to have his right established to execute the decree against the zemindar's property in hands of the Court of Wards.

"The Court of Wards set up various pleas, only one of which now concerns us. It was that the decree being 12 years old was incapable of execution.

"The Lower Court held, on 29th November 1893, that, as no application to execute the decree had ever been granted, the decree could still be executed, and on appeal by the present zemindar, I upheld that finding (appeal suit No. 586 of 1894) on 18th March 1895.

* Appeal against Appellate Order No. 28 of 1897.

On the 3rd October 1895, plaintiff has now put in the sixth application for execution, this time against the present zemindar."

The petition was presented under Civil Procedure Code, Sections 274 and 623, and paragraphs 6 and 10 of the petition were as follows:—

[259] "*Previous execution, if any.*—Petition was put in on the 17th September 1883 and nothing was recovered. The petition presented on the 17th September 1886, having been returned, another petition was put in on the 24th September 1886 and notice was ordered, and it was dismissed for non-payment of batta. Petition was presented on the 25th September 1895 and it was dismissed for non-payment of batta for notice. Petition was put in on the 21st June 1892, praying that I may be treated as assignee-plaintiff and that the amount found deposited in the Taluk may be attached; and the execution petition was dismissed on the 5th September 1892, directing me to institute a regular suit. A petition was put in on the 19th September 1892 praying that I may be treated as assignee-plaintiff and that the immoveable properties may be attached, it was ordered on the 20th October 1892 that a regular suit may be instituted. In obedience to the said order I filed suit No. 632 of 1892 of this Court and appeal suit No. 586 of 1894 of the District Court, Tanjore, and a decree was passed on the 18th March 1895 directing me among other things to go on with the execution of the decree in original suit No. 103 of 1880 as assignee plaintiff.

"*Relief prayed for.*—As it was decided, in original suit No. 632 of 1892 on the file of this Court and in appeal suit No. 586 of 1894 preferred thereon on the file of the District Court, Tanjore, on the 18th March 1895, that I should be treated as assignee-plaintiff so as to enable me to execute the decree, in accordance with the order directing me to bring a regular suit, dated 20th August 1892, passed on the petition presented by me on the 19th September 1892, praying that I may be made assignee-plaintiff in this suit and that the amount may be recovered (for me), I pray that the Court may be pleased to restore to its file the petition, dated 19th September 1892, and to order that the immoveable properties mentioned in the list presented with this petition and referred to in the decree in original suit No. 632 of 1892, and also described in the list attached to this petition, may be attached for the amounts mentioned in columns 7 and 8 herein and also for subsequent interest and execution charges, &c., and sold at auction and the amount recovered for me."

The District Munsif dismissed the petition on the ground that three years had elapsed between the dates of the second and third petitions for execution. The District Judge held that it was not [260] open to the zemindar to raise this point and that the present petition should be regarded as a continuation of the previous proceedings—as to which he referred to *Chandra Prodhan* v. *Gopi Mohun Shaha* (1) and *Narayana Nambi* v. *Poppi Brahmani* (2), He accordingly reversed the order of the District Munsif and granted the relief sought.

The zemindar preferred this appeal.

*Pattabhirama Ayyar*, for appellant.

*V. Krishnasami Ayyar*, for respondent.

## JUDGMENT.

This is an appeal from the District Judge allowing an execution petition on the ground that though dated more than three years after the

(1) 14 C. 385. (2) 10 M. 22.

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last preceding application it is in effect a mere revival or continuation of it. In June 1892, the respondent had put in a petition which was dismissed, the petitioner being relegated to a regular suit to establish his right. He did not bring a suit, but in September 1892 put in a fresh application to execute. This was dismissed as he had not chosen to take the course suggested when his previous application had been dismissed. After this the respondent filed his suit to have his right established and that suit ended in his favour on the 18th March 1895. On the 3rd October 1895 more than three years after his last petition was dismissed, he put in the present application asking to have the former application of September 1892 revived or continued. Both the Courts held that this application was not barred because it was in effect a mere revival of the last previous application.

We think this decision is wrong. Had there been any reason for saying that the proper order on the hearing of the last application should have been one which could hold the decision in suspense pending the decision of the regular suit, it might well be that there would be some reason for saying that this application could be treated as an application to proceed with a pending application, but that is not the case here. The only proper order that could have been made in the circumstances was an order absolutely dismissing the application inasmuch as the order that preceded it had relegated the petitioner to a regular suit which he had not chosen to bring. We cannot therefore view the decision as one suspending the application for execution, nor can we agree that, where an order finally and properly dismisses an application for [261] execution, a fresh application for execution can be treated as a renewal of it, even though such application may contain apt words for the purpose. Moreover we know of no process by which an application, which has properly been dismissed, can be revived.

For these reasons, without going into the other contentions raised, we allow the appeal.

We reverse the order of the District Judge and restore that of the District Munsif. The respondent must pay the appellant's costs in this and the Lower Appellate Court.

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21 M. 261 = 8 M.L.J. 18.

## APPELLATE CIVIL.

*Before Mr. Justice Benson and Mr. Justice Boddam.*

SASIVARNA TEVAR (*Assignee-Plaintiff*), *Appellant v.* ARULANANDAM PILLAI AND ANOTHER (*Defendant No. 2 and his Representative*), *Respondents.**

[15th October, 1897.]

*Limitation Act—Act XV of 1877, Schedule II, Articles 178, 179—Application for execution "struck off the file"—Further application for execution—Renewal of previous application.*

An application for execution of a decree of a District Munsif was made in April 1893, but was struck off the file on 20th July 1893 on a stay of execution having been ordered by the Subordinate Judge. After the termination of the proceedings in the Subordinate Court the decree-holder applied again for execution on 6th July 1896:

* Appeal against Appellate Order No. 23 of 1897.

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*Held* that the latter application should be regarded as a continuation of the former, and was not barred by limitation.

[R., 28 M 53 = 14 M.L.J. 401; 31 M. 71 = 18 M.L.J. 46; 4 L.B.R. 83 = 14 Bur. L.R. 323.]

APPEAL against the order of S. Russel, District Judge of Madura, in civil miscellaneous appeal No. 18 of 1896, affirming the order of N. Sambasiva Ayyar, District Munsif of Sivaganga, in execution petition No. 416 of 1896 (in original suit No. 365 of 1887).

The facts were stated by the District Judge as follows:—

"Application, dated 14th April 1893, was presented for execution. "The Subordinate Court, by injunction, stayed the execution of the application. The District Munsif passed an [262] order:—'Execution 'stayed by the Subordinate Court, petition struck off the file consequently,' dated 20th July 1893. After the suit in the Subordinate Court "was disposed of, the plaintiff filed the present application, dated 6th July "1896. This application does not ask that the former application which "was stayed be proceeded with. It is a new application, and it distinctly "refers to the fact that the application, dated 14th April 1893, was struck "off by the District Munsif. If the present application is a new application, it is admittedly barred by limitation."

The applicant preferred this appeal.

*V. Krishnasami Ayyar*, for appellant.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*) and *Gopalasami Ayyangar*, for respondents.

## JUDGMENT.

The facts of the case are sufficiently stated by the District Judge, but we cannot agree with him in his conclusion that the District Munsif did, in fact, dispose of the application for execution, dated the 14th April 1893. The District Munsif's order on the petition is "Execution stayed by the Subordinate Court; petition struck off the file, consequently." Thus the District Munsif struck the petition off his file, simply because execution had been temporarily stayed by the Subordinate Court. The District Munsif had no legal authority to dismiss the petition, simply because the execution had been stayed, nor did he, in fact, dismiss it. He struck it off his file, by which we apprehend he merely ceased to show it as pending in his statistical returns, but the petition not having been dismissed or otherwise legally disposed of must be regarded as still pending. This was the view taken by Muttusami Ayyar, J., in an exactly similar case (*Sri Rajah Papamma Rau* v. *Venkatappaya* (1), in which he followed the rulings of both the Calcutta and Bombay High Courts (*Biswa Sonan Chunder Gossyamy* v. *Binanda Chunder Dibingar Adhikar Gossyamy* (2) and *Chintaman Damodar Agashe* v. *Balshastri* (3)).

The next question is this: Are we bound to regard the present application for execution as a new application for execution, or may we regard it as in substance an application to continue the pending proceedings, *i.e.*, the application of the 14th April 1893. [263] In form it is a new application, and the decision of the District Judge that it must be dealt with as such, is based on the rulings in *Narayana Nambi* v. *Pappi*

(1) Appeal against Appellate Order No. 34 of 1892 (unreported).
(2) 10 C. 416.
(3) 16 B. 294.

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*Brahmani* (1). Parker, J., was a party to that decision, but in a later case (*Chathappan Nayar* v. *Kunhammed Kutti* (2)), he held that an application similar to that now in question might properly be regarded as an application in continuance of an earlier application, and pointed out that in *Narayana Nambi* v. *Pappi Brahmani* (1), the application was to attach again the same property which had been released on an objection petition, but that in the case before him there had been no stoppage in the proceedings in execution. So in the present case we must hold that there has been no legal stoppage in the execution proceedings, and therefore the case in *Narayana Nambi* v. *Pappi Brahmani* (1) is not applicable. This view is in accordance with the decisions in *Chandra Prodhan* v. *Gopi Mohun Shaha* (3), *Chintaman Damodar Agashe* v. *Balshastri* (4) and *Thakur Prasad* v. *Fakirullah* (5).

For these reasons we consider that the present application may be properly regarded as one in continuance of the application of the 14th April 1893, which is still legally pending before the District Munsif.

We must, therefore, set aside the order of the District Judge and restore that of the District Munsif with costs in this and in the Lower Appellate Court.

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21 M. 263.

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

VENKATASUBRAMANIAM CHETTI AND OTHERS (*Defendants Nos. 1 to 3*), *Appellants v.* THAYARAMMAH AND ANOTHER (*Plaintiffs*), *Respondents.** [7th February and 14th March, 1898.]

*Hindu law—Law of inheritance—Stridhanam—Husband's nieces—Bandhu.*

A Hindu widow, married according to one of the approved forms, died without issue leaving her surviving the plaintiffs who were the daughters of the husband's [264] deceased brother, and the first defendant who was her adopted son of her sister's daughter, and the second defendant who was the adopted son of her maternal uncle, and the third defendant who was the widow of her brother. The defendants having taken possession of her stridhanam property on her death, the plaintiffs now sued as heirs under the Hindu law for possession:

*Held*, that the plaintiffs were entitled to succeed.

[R., 29 M. 358 = 1 M.L.T. 68 ; 36 M. 116 = 21 M.L.J. 850 (854) = 10 M.L.T. 494 (495) = (1911) 2 M.W.N. 168 ; 20 P.R. 1906 = 69 P.L.R. 1906.]

APPEAL against the decree of Mr. Justice Boddam sitting on the original side of the High Court in civil suit No. 149 of 1897.

Suit for possession of certain moveable and immoveable property constituting the estate and effects of one Rangammah, a Hindu widow, who died without issue on the 9th of June 1897. The plaintiffs were the married daughters of a deceased brother of Rangammah's husband. Rangammah had one brother and two sisters, all of whom predeceased her. The third defendant was the widow of the brother. The fourth defendant was the widow of the brother of the elder sister's husband. The first defendant was the adopted son of the younger sister's daughter and the

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* Original Side Appeal No. 50 of 1897.

(1) 10 M. 22. (2) Appeal against Order No. 108 of 1895 (unreported). (3) 14 C. 385. (4) 16 B. 294. (5) 17 A. 106.

second defendant was the adopted son of Rangammah's maternal uncle; and it was alleged that they had taken possession of Rangammah's property on her death.

It was stated in the plaint that "Ammayee Ammah, the lawfully "married wife of Vemah Kondayya Chetti in an approved form of marri-"age and his widow, died in Madras on or about 11th or 12th January "1897, having, prior to her death and whilst in sound memory and under-"standing, left a will duly executed by her on 16th December 1896, "appointing one Bheemavaram Rangammah as sole executrix and giving "absolutely to the said Rangammah the properties left under it which "were her (*i.e.*, Ammayee Ammah's) absolute stridhanam properties. That "the said Rangammah also died in Madras on or about 9th June 1897, "leaving, as her properties, those which she had acquired under the said "will of Ammayee Ammah and those that she acquired herself and those "that she had inherited from her husband Bheemavaram Chinna Varadaya, "to whom she had been lawfully married in an approved form of marri-"age." The fourth defendant did not defend the suit. The other defendants denied the plaintiff's title to succeed to Rangammah's property which they alleged had been acquired by her as legatee of her mother and her sister Ammayee Ammah and did not include any property inherited from her husband. The first three issues in this suit were framed as follows:—

[265] "*First.*—Whence did Rangammah acquire the property left "at her death?

"*Second.*—Are the plaintiffs entitled to inherit it assuming that the "first and second defendants are adopted as they claim to be?

"*Third.*—Are the adoptions set up by the first and second defendants "true and valid?"

Mr. Justice Boddam gave judgment for the plaintiffs. He said:—"I think having regard to the current of decisions of this Court commen-"ing with *Kutti Ammal* v, *Radakristna Aiyan* (1) down to *Ramappa* "*Udayan* v *Arumugath Udayan* (2), I must hold that the daughters of a "brother of the deceased's husband in the absence of any male heirs are "entitled to succeed as preferential heirs to the defendants who are "related to the stock of the mother of the deceased.

"The deceased Rangammah took under the will of her sister certain "property. This she traded with, lending money on pledges, and died "intestate. At her death, intestate, the present question arises as to "who is the person entitled to succeed. The pedigree in the plaint is "admitted. The plaintiffs are the daughters of Rangammah's deceased "husband's deceased brother, and there are no other living relatives of "the husband. The defendants are all relatives on Rangammah's mother's "side. It is practically admitted that the property passes to the hus-"band's heirs if any; but it is contended that the plaintiffs being daughters "of a deceased brother are incapable of inheriting. I have decided against "this contention.

"I answer the first issue by saying upon the evidence Rangammah "acquired the property left at her death from her sister Ammayee Ammah "in the first place and afterwards she traded and increased it. To the "second and third I say the plaintiffs are entitled to inherit even assum-"ing as is admitted that the first and second defendants are adopted as "they claim to be."

Defendants Nos. 1 to 3 preferred this appeal.

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(1) 8 M.H.C.R. 88. (2) 17 M. 182.

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*Sundara Ayyar* and *Etiraja Mudaliar*, for appellants.
*Pattabhirama Ayyar* and *Venkataramayya Chetti*, for respondents.

JUDGMENTS.

[266] The dispute in this case is as to the right of succession to the stridhanam of one Rangammah who had been married according to one of the approved forms but who died without issue, male or female, her husband having predeceased her. The learned Judge holds that the plaintiffs—the daughters of Rangammah's husband's brother—are, in the absence of nearer heirs, entitled to take property by succession.

In the argument before us two contentions were urged on behalf of the appellants (defendants Nos. 1 to 3), *viz.*, firstly, that the plaintiffs are, under the law, not in the line of heirs at all; secondly, that, if they are, the second defendant (assuming he is, as alleged by him, Rangammah's maternal uncle's adopted son) has a preferential right to the property in dispute.

With reference to the first of these contentions the question is whether the plaintiffs are in the line of heirs to their uncle, since, in the admitted circumstances of the case, the heirs entitled to take Rangammah'g stridhanam would, under the Mitakshara, be her husband's heirs. Now, undoubtedly, the plaintiffs are sapindas of their uncle, in the Mitakshara sense of the term 'sapinda,' inasmuch as they have community with him of particles of the same body as explained in the *Achara Kanda* of the Mitakshara. And as persons liable to be transferred by marriage to a gotra other than that of their birth, they (plaintiffs) must be looked upon as sapindas of a different gotra and would, therefore, be their uncle's bandhus unless, as was argued on behalf of the appellants, they were precluded from claiming such heritable right in consequence of their sex. But such an argument it is too late in this Presidency to raise, it being opposed to the *ratio decidendi* of several decisions in this Court beginning with *Kutti Ammal* v. *Radakristna Aiyan* (1) decided more than twenty years ago and which recognized the right of a sister to inherit her brother's estate. No doubt in that case her right was not in terms stated to be that of a bandhu ; but not being a sagotra, sapinda or samanodaca, she could have been let in only as a bandhu, and that it was in that right her claim was admitted has been repeatedly pointed out. See *Lakshmanammal* v. *Tiruvengada* (2), *Mari* v. *Chinnammall* (3), *Nallanna* v. *Ponnal* (4), and *Balamma* v. *Pullayya* (5).

[267] Following the decision upholding the sister's right, that of other female relations to succeed as bandhus has also been recognized ; see *Nallanna* v. *Ponnal* (4) already cited and *Ramappa Udayan* v. *Arumugath Udayan* (6). It may also be added that in *Chinnammal* v. *Venkatachala* (7), a man's father's sister was expressly referred to by the learned Judges, who decided the case, as a bandhu. Great stress was laid on behalf of the appellants upon the language used in *Sundrammal* v. *Rangasami Mudaliar* (8) with reference to a sister's daughter's right to come in as a bandhu. But we must take those observations as intended to draw a distinction between the less preferential right of female bandhus and that of the more favoured male bandhus or 'regular bandhus' as they were otherwise spoken of by the learned Judges. We ought not we think to understand those observations as intended to deny that female

(1) 8 M.H.C.R 88. (2) 5 M. 241 (250). (3) 8 M. 107 (130).
(4) 14 M. 149 (150). (5) 18 M. 168 (170). (6) 17 M. 182.
(7) 15 M. 421. (8) 18 M. 193 (198, 199).

sapindas in general do come within the definition of bandhus under the Mitakshara, especially when we consider that the same learned Judges had not only in *Nallanna* v. *Ponnal* (1) in unequivocal terms decided that a man's son's daughter is a bandhu, but also subsequent to *Sundrammal* v. *Rangasami Mudaliar* (2) pointed out that *Kutti Ammal* v. *Radakristna Aiyan* (3) proceeded "on the view that any relative who is also a cognate "may be treated as coming within the definition of bhinna gotra sapinda, "and that the term sapinda, as used in Chapter 2, Section 6, of the "Mitakshara included females." (*Balamma* v. *Pullayya* (4)). We must therefore hold that the plaintiffs are not precluded from claiming as bandhus of their uncle by reason of their sex and that consequently they are in the line of heirs to the deceased Rangammah's stridhanam. The only other contention urged on behalf of the appellants is shortly disposed of. It rests entirely upon a misconception as to the import of a text of Vrihaspati referred to in paragraphs 622-3 of Mayne's Hindu law. The learned author, no doubt, mentions among others a woman's maternal uncle's son as one of the persons entitled, according to Vrihaspati, to claim her stridhanam. But that the whole explanation of the text given by Mr. Mayne is erroneous will be evident from a careful examination of the text **[268]** itself. It runs as follows:—"The sister of a mother, the wife "of a maternal or of a paternal uncle, the sister of a father, the mother of "a wife, and the wife of an elder brother are declared equal to a mother. "If they leave no male issue of their body nor the son of a daughter, nor "a daughter, the sister's son and the rest shall inherit their property." (Guru Doss Banerjee's Marriage and Stridhanam, 2nd edition, page 387.)

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The meaning of the text, borrowing the language of Dr. Banerjee, is as follows:—"To a male, the females related as the sister of his mother, the "wife of his maternal or of his paternal uncle, the sister of his father, the "mother of his wife and the wife of his elder brother are like his mother; "and so to a female, the males related in the reciprocal way as her sister's "son, her husband's sister's son, her husband's brother's son, her brother's "son, her daughter's husband and her husband's younger brother are like "her son. And these last-mentioned relations of a female being like her "sons inherit her stridhanam if she leave no male issue, nor son of a "daughter, nor a daughter." (*Ibid.*, 387 and 388.)

The second defendant, assuming that he is Rangammah's maternal uncle's adopted son, is not a relation specified in the text and, consequently, he cannot under it set up any right as against the plaintiffs. It is unnecessary, therefore, to consider and express any opinion on the question, much discussed in the argument, whether the passages in the Smriti Chandrika (5) and other Southern Commentaries, which refer to and rely on the text, are to be accepted as modifying the rule laid down by the Mitakshara with reference to the devolution of the stridhanam of a woman married in one of the approved forms but dying without issue.

The decision of the learned Judge is right. The appeal fails and is dismissed with costs.

(1) 14 M. 149 (150). (2) 18 M. 193 (198, 199). (3) 8 M.H.C.R. 88.
(4) 18 M. 168 (170). (5) Chapter IX, Section III, § 36.

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## [269] APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

KASTURI CHETTI (*Claimant*), *Appellant v.* DEPUTY COLLECTOR, BELLARY (*Referring Officer*), *Respondent.**
[14th, 15th and 24th February, 1898.]

*Court Fees Act—Act VII of* 1870, *Sections* 5, 8, 28, *Schedule* II, *Article* 17 (*iv*)—*Appeal against award under Land Acquisition Act.*

An appeal against an award made by the District Judge under Land Acquisition Act I of 1894 was filed in the High Court, the appeal memorandum bearing a Court-fee stamp of Rs. 10 only and was admitted by the Registrar, no question having been raised as to the sufficiency of the stamp. On the appeal having been posted for hearing, it was objected on the part of the respondent that the stamp paid was insufficient:

*Held*, that the appeal memorandum should have borne an *ad valorem* stamp under Court Fees Act, Section 8, and that there having been no decision by the taxing officer under Section 5, it was open to the respondent to raise the objection on appeal at the hearing.

[R., 37 C. 914=8 Ind. Cas. 1145 (1146); 39 C. 906 (912)=14 Ind. Cas. 724.]

APPEAL against an award of T. M. Horsfall, Acting District Judge of Bellary, under Land Acquisition Act I of 1894, in claim No. 3 of 1896.

The claimant was the owner of certain land proposed to be acquired for sanitary purposes for the Bellary Municipality under the Land Acquisition Act. The Head-Quarters Deputy Collector awarded Rs. 370-4-9 under Section 11. The land-owner being dissatisfied with this reward, preferred a claim to the District Court for a sum of Rs. 4,600. The District Judge awarded Rs. 463.

The land-owner now preferred this appeal.

*Venkataramayya Chetti*, for appellant.

The Government Pleader (Mr. *E. B. Powell*), for respondent.

### JUDGMENT.

The Government Pleader draws our attention to the fact that this appeal should have been on a stamp of Rs. 235 under Section 8 of the Court Fees Act, instead of being as it is on a stamp of Rs. 10 under Article 17 (iv) of Schedule II of the Court Fees Act. There can be no doubt but that the objection is well founded. Article 17 (iv) of Schedule II of the Court Fees Act [270] prescribes generally the proper stamp for a suit to set aside an award, but Section 8 of the same Act is a special provision applicable to appeals against all orders including awards, relating to compensation under the Land Acquisition Act, and the special provision overrides and governs the general provision in accordance with the ordinary and well established rules of construction.

The Vakil for the appellant, however, contends that the appeal having been admitted by the Registrar on a stamp of Rs. 10, no objection as to the amount of the stamp can now be taken, and he relies on the authority of the decision in *Ranga Pai* v. *Baba* (1).

In that case, however, the Court assumed that there was a "decision" by the taxing officer under Section 5 of the Court Fees Act, and the whole

* Appeal No. 138 of 1897.
(1) 20 M. 398.

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of the reasoning in that case proceeds on that assumption. In the present case, however, there was no "decision" by the taxing officer within the meaning of Section 5 of the Court Fees Act. That section requires that there should be, in the first instance, a difference of opinion between the officer whose duty it is to see that the proper fee is paid, and any suitor or attorney as to the fee payable, and, secondly, that there should be a reference to the taxing officer, who should then give a "decision" on the question raised. In the present case there was no such difference or reference, nor was there any decision by the taxing officer except such as might be implied from the admission of the appeal. That, in our opinion, is not such a "decision" as the section requires. We think that, unless the question was raised before the taxing officer and unless he brought his mind to bear on the question and decided it, Section 5 of the Court Fees Act had no application. Otherwise there would be no remedy for the most obvious error, or even for a deliberate trick to defraud the stamp revenue, unless detected by the routine establishment in the first instance, and before the admission of the appeal or the reception of the paper, as the case might be:—Section 28 of the Court Fees Act clearly contemplates the possibility of such mistakes and provides a remedy even in the High Court. We are, therefore, of opinion that the case relied on is not on all fours with the present case, and that Section 5 of the Court Fees Act does not prevent our now taking notice of the deficiency in the stamp duty.

**[271]** Under Section 582-A, Civil Procedure Code, we allow the appellant to pay the deficient stamp duty within one week from this date; failing which, the appeal will stand dismissed with costs.

This appeal coming on for final hearing and the appellant's Vakil not having complied with the above order, the Court delivered the following

## JUDGMENT.

The deficient stamp duty not having been paid, the appeal is dismissed with costs. The costs will be calculated on the appellant's valuation of the appeal.

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## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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KOTI PUJARI (*Plaintiff*), *Petitioner v.* MANJAYA AND OTHERS (*Defendants Nos.* 1 *and* 3 *to* 17), *Respondents.** [15th December, 1897.]

*Suit's valuation—Pecuniary limits of jurisdiction—Suit filed in superior Court.*

In a suit on a mortgage, in which the amount claimed was in excess of the pecuniary limits of the jurisdiction of a District Munsif, and which was filed in the Court of a Subordinate Judge, it appeared that there had been an adjudication by a District Munsif in a previous suit affecting the rights of the parties now in issue, and that the present claim was largely composed of interest. The Subordinate Judge having framed issues relating to the claim for interest and having tried them as preliminary issues, decided that the suit was within the pecuniary limits of the jurisdiction of a District Munsif, and that the claim had been unwarrantably exaggerated with a view to filing the suit in a superior Court, and so avoiding the plea of *res-judicata*, and he thereupon returned the plaint to be presented in the proper Court.

* Civil Revision Petition No. 165 of 1897.

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*Held*, that the procedure adopted was wrong and that the whole suit should have been tried.

[R., 6 O.C. 255.]

PETITION under Civil Procedure Code, Section 622, praying the High Court to revise the proceedings of H. G. Joseph, District Judge of South Canara, in civil miscellaneous appeal No. 30 of 1896, dismissing an appeal against order of U. Achutan Nayar, Acting Subordinate Judge of South Canara, in original suit No. 8 of 1896.

**[272]** Suit on a mortgage to recover Rs. 999 principal, and Rs. 1,800 interest, with further interest and costs. The defendants pleaded that the mortgagor was not competent to mortgage validly the premises which belonged to the family, and that it had been held in a previous suit tried by a District Munsif that Rs. 599 forming part of the mortgage money was not chargeable on the property, that the interest was calculated under a penal and unenforceable stipulation, and that the claim included *post diem* interest. The instrument sued on contained, *inter alia*, the following clauses :—

"We have received Rs. 999 as per above particulars; we shall pay "every year from this day on the 30th Bahula of the month of Magha "Rs. 70, being interest on the amount at 7 per cent.

"The principal amount we shall pay you, together with arrears of "interest, if any, in one lump sum, on the 30th April of any year after "the 30th April 1881 and within the 30th April 1886, and take back from "you this mortgage bond, together with mortgage bond taken back from "Duje Prabhu and handed over to you, and the prior documents referred "to therein and the decree in English evidencing the title to this land.

"If interest is not paid on the due date, and should fall in arrears, "we will pay at the rate of 12 per cent. interest on the principal sum "from the date of default."

The Subordinate Judge framed and tried as preliminary issues the following :—

1. "Whether the plaintiff is entitled to interest after the date fixed "for repayment in the absence of a covenant to that effect?

2. "If plaintiff is entitled to interest at all, to what rate is he "entitled?"

In the result he held that the suit was within the jurisdiction of the Court of a District Munsif and he returned the plaint for presentation in the proper Court. He said :—"In the present case the bond fell due "on the 30th April 1886, and the claim for *post diem* interest is barred "by limitation more than six years having elapsed before the presen- "tation of the plaint on the 30th January 1896. The defendants argue "that the plaintiff knowing well that the claim for *post diem* interest "is not sustainable has included it in this suit and put it so high as to "oust the jurisdiction of the Munsif and to give jurisdiction to this "Court. Though, in case of default, 12 per cent. interest is made payable "from the date of default, yet the original rate fixed in the bond being "**[273]** 7 per cent., it is contended that the plaintiff, who is entitled only "to a reasonable rate, cannot claim as *post diem* interest, a rate higher than "that fixed in the bond, and that the claim for 12 per cent. interest is an "unwarrantable addition to give jurisdiction to this Court. *Lakshman* "*Bhatkar* v. *Babaji Bhatkar* (1). I think this ruling is in point.

"I am also of opinion that plaintiff's error is not a *bona fide* one. In "original suit No. 333 of 1884, the Puttur Munsif decided that out of

(1) 8 B. 31.

"the consideration of Rs. 999, Rs. 599 was not chargeable on the family "property. This decision was confirmed in appeal suits Nos. 24 and 25 "of 1888. To avoid the plea of *res judicata*, the plaintiff delayed the "institution of this suit for nearly 12 years from the date of that decision, "and nearly 10 years from the date in which the bond fell due."

The plaintiff preferred an appeal to the District Judge who dismissed it agreeing with the Subordinate Judge.

The plaintiff preferred this petition.

Mr. *C. Krishnan* and *Madhava Rau*, for petitioner.

*Narayana Rau*, for respondents.

## JUDGMENT.

We think that the Courts below were in error in holding that the claim either for *post diem* interest or for the portion of principal said to have been disallowed in a previous suit were unwarrantable additions to the claim made for the purpose of changing the *venue*, nor do we think that the Courts could properly entertain such a plea as a matter preliminary to determining the Court in which the suit ought to be brought. There is, in the present case, no question of over-valuation of the subject-matter of the suit. The contest is as to whether the plaintiff can recover the whole or only a part of the sums claimed by him in the suit, *viz.*, a portion of the principal and *post diem* interest. These are the very questions involved in the suit and are not preliminary questions connected with the proper valuation of the subject-matter of the suit. Very grave inconvenience and confusion would result if pleas raised by the defence as to the right of the plaintiff to portions of the relief sought by him and which he would be entitled to on establishing the allegations of the plaint, were allowed to be treated as preliminary questions affecting the valuation of the suit, and which ought to be determined in order to ascertain the Court **[274]** in which the suit should be brought. In the present case the claim for *post diem* interest is one which the plaintiff is entitled to raise, having regard to the recent decisions on the subject, while the claim for the sum said by the defendant to be *res judicata* is one which the plaintiff can establish if he can show that there is no *res judicata*, and that the debt was incurred for purposes binding on the defendant. If the valuation of the suit is right, no question of *res judicata* by virtue of the decision in the District Munsif's Court can arise, since that Court could not have tried the present suit.

We have not overlooked *Lakshman Bhatkar* v. *Babaji Bhatkar* (1) on which much stress was laid by the respondents' pleader, but we think that the present case is distinguishable from it. Were it otherwise, we should hesitate to go so far as the learned Judges seemed disposed to go in applying the principle enunciated by him with reference to the duty of the Court in cases of alleged over-valuation.

We must therefore set aside the orders of the Courts below, and direct that the District Judge do receive the plaint and dispose of it according to law.

Costs throughout will abide and follow the result.

(1) 8 B. 31.

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## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

JAGAPATI MUDALIAR (*Defendant*), *Petitioner v.* EKAMBARA MUDALIAR (*Plaintiff*), *Respondent.** [15th December, 1897.]

*Pleader and client—Authority of pleader—Compromise entered into by pleader without the client's consent.*

It is not competent to a pleader to enter into a compromise on behalf of his client without his express authority to do so.

[F., 17 C.W.N. 156 (159) = 15 Ind. Cas. 156; R., 22 M. 538 (547); 23 M. 101; 6 C. W.N. 82 (86); 7 Ind. Cas. 505 = 213 P.L.R. 1910 = 86 P.W.R. 1910; D., 17 Ind. Cas. 391 (392) = 23 M.L.J. 381 (382) = 12 M.L.T. 348.]

PETITION under Civil Procedure Code, Section 622, praying the High Court to revise the proceedings of V. Saminada Ayyar, District Munsif of Trivellore, in small cause suit No. 1088 of 1896.

[275] The defendant in the suit retained a pleader and signed a vakalat in the following terms:—"I, the defendant in the above suit, have "appointed you as my vakil to conduct the suit on my side. Therefore, "I shall accept, as having been conducted by me in person, all the acts "done by you in the Court, concerning the suit, such as applications "written by you for me and those that are spoken, signed and argued for "me.'

"Subsequently" said the District Munsif, "a compromise petition "signed by the plaintiff and his pleader and by the defendant's pleader, but "not defendant, was put in in this suit on 18th December 1896. According "to a practice which it is generally found convenient to follow, the defendant "ant was ordered by the Court on that day to turn up in person or send a "special power to compromise, the vakalat already filed by his pleader "containing only a general power to act without an express power to com- "promise. It is conceded that there was nothing limiting the scope of "the pleader's general authority to act, as for instance, by an express "direction not to compromise. The defendant turned up in person on 4th "January 1897, and orally stated that he did not agree to the compromise "signed by his pleader and put into Court on 18th December 1896. The "only question for consideration, therefore, on which there has been some- "what a conflict of opinion, is whether a compromise entered into by a "pleader on behalf of his client without a special power to compromise and "without express instructions to the contrary is binding on the client as "against third persons."

The District Munsif answered the question thus stated by him in the affirmative referring to *Jagannathdas Gurubakshdas* v. *Rāmdas Gurubakshdas* (1), *Jang Bahadur Singh* v. *Shankar Rai* (2), and he passed a decree in accordance with the terms of the compromise.

The defendant preferred this petition.

*Champion & Biligiri*, for petitioner.

*Sivasami Ayyar*, for respondent.

## JUDGMENT.

We are unable to accept the view taken by the District Munsif. In England, no doubt, as urged for the plaintiff, an attorney, though he has not obtained express authority from his client for the purpose, has yet

* Civil Revision Petition No. 99 of 1897.

(1) 7 B.H.C.R. (O.C.J.) 79.

(2) 13 A. 272.

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power to enter into a compromise [276] on behalf of the latter. However, as pointed out in the note to Section 24 of Story on Agency (9th edition, page 27), such power has given rise to much litigation in England. It is not surprising, therefore, that even many of the American Courts, administering the English Common Law have declined to follow the English rule referred to. It is true that in the note in Story, cited above, it is said that the American decisions on the point generally agree with those of the English Courts. But the accuracy of that observation has been questioned in *Levy* v. *Brown* (1), where the Court says:—"In "the elaborate note to Section 24, in Story on Agency, and also in "Wharton on Agency, Section 592, it is said that the American rule is the "same as the English. If these learned authors mean to say that a "majority of the American Courts recognize an inherent right in the "attorney to compromise the original demand placed in his hand, so as "to receive in full satisfaction less than the amount due, or to substitute "claims upon other parties, or to take property in satisfaction of a money "demand, or to release any security existing when he received the claim, "we cannot agree with them. That there are cases going to this extent "is true, but we think that the decided weight of authority in this country "is the other way." When such is the case in countries advanced as those American States are, it would scarcely be safe to apply the English rule to practitioners in the position occupied by the majority of vakils here. *Prem Sookh* v. *Pirthee Ram* (2), *Musumat Hakeemoonnissa* v. *Buldeo* (3), *Musumat Sirdar Begum* v. *Musumat Izzut-ool-Nissa* (4), *Gour Pershad Doss* v. *Soogdeb Ram Deb* (5), *Chunder Coomar Deo* v. *Mirza Sudakat Mahomed Khan* (6), and *Sheikh Abdul Sabhan Chowdhry* v. *Shibkisto Daw* (7), are clear and distinct authorities against the view adopted by the District Munsif. Moreover so far as this Presidency is concerned, it has been hitherto tacitly understood by all that a vakil has no implied authority to enter into a compromise on behalf of his client, as is manifest from the practice of the Courts which invariably insist upon the production of special authority from the client expressing consent to the compromise entered into on his behalf by the Vakil before the [277] compromise is accepted by the Court. It is scarcely necessary to say that there is a considerable difference between the case where a pleader by way of compromise purports to give up a right claimed by the client, or to saddle him with a liability that is not admitted, and the case on which stress was laid in the argument, *viz.*, where a pleader makes admissions as to relevant facts in the usual course of litigation, however much those admissions affect the client's interest. The power to bind by such admissions, which, in effect, is but dispensing with proof of the facts admitted, is one of the well-recognized incidents of a pleader's general authority. To deny power so to bind the client or to do any similar act obviously necessary for the due conduct of litigation would so embarrass and thwart a pleader as in a great measure to destroy his usefulness. But no such undesirable results would follow from holding that in the absence of specific authority, a pleader cannot bind by compromises strictly such. It is true that the opinion of a pleader as to the advisability of a compromise is often valuable. But it must be conceded that a client ought to have the power of deciding for himself whether a right asserted should be relinquished, and whether a liability denied should be accepted.

(1) 30 American Reports, 359. (2) 2 Agra H.C.R. 222.
(3) 3 Agra H.C.R. 309. (4) 2 N.W.P.H.C.R. 149. (5) 12 W.R. C.R. 279.
(6) 18 W.R. C.R. 436. (7) 3 B.L.R. App. 15.

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Having regard to all the considerations bearing on the matter, we think we ought to follow the Indian cases to which we have referred, and hold that the compromise in the present instance entered into by the defendant's vakil without the defendant's authority and the decree passed thereon in spite of his opposition are not binding on him. The decree is therefore set aside, and the suit remanded for disposal according to law. Costs will abide and follow the result.

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**21 M. 278.**

## [278] APPELLATE CIVIL.

*Before Mr. Justice Davies and Mr. Justice Benson.*

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IN APPEAL NO. 81 OF 1897 :—

ALAGIRISAMI NAICKAR AND OTHERS (*Defendants Nos.* 2, 4, 5 *and* 6), *Appellants v.* SUNDARESWARA AYYAR AND OTHERS (*Plaintiffs and Defendant No.* 7), *Respondents.*

IN APPEAL NO. 83 OF 1897 :—

SUBBAYYAR (*Defendant No.* 7), *Appellant v.* SUNDARESWARA AYYAR AND ANOTHER (*Plaintiffs*), *Respondents.**

[28th February and 1st and 15th, March 1898.]

*Limitation Act—Act XV of* 1877 *Section* 28, *Schedule II. Article* 124—*Right to a temple office and its endowments—Adverse possession—Civil Procedure Code—Act XIV of* 1882, *Section* 13, *Expl. II*—Res judicata.

Certain offices in a temple and the endowments attached thereto were held jointly by the members of two branches of a family, represented respectively by the plaintiff and the defendant. Long previously to 1872 the defendant's branch got into sole possession, and in that year a family settlement was arrived at by which it was arranged that the offices should be held in rotation and the lands in equal shares : and, in accordance with this settlement, a certain village forming part of the endowment was delivered to the plaintiff's branch of the family. In 1889 the defendant brought a suit to recover a moiety of that village and an issue was raised whether he enjoyed the offices and the landed property in his independent right or as a servant for wages. His suit was dismissed on the ground that the offices and emoluments were indivisible and went by right to the older branch of the family. The plaintiff now sued in 1895 to establish his right to the entire offices and to recover possession of the other village :

*Held*, that it was open to the defendant to assert in this suit a title by adverse possession as that had been made a ground of attack, though not the basis of his claim in the former suit, and that the defendant had acquired a divisible right to a moiety by twelve years' adverse possession and that the suit should, to that extent, be dismissed.

[R., 27 M. 192 = 13 M.L.J. 341 ; 11 C.L.J. 2 (13) = 3 Ind. Cas. 408 ; 11 C.L.J. 304 (314) = 3 Ind.Cas. 419 ; 14 Ind.Cas. 520 = 22 M.L J. 278 (279) = 12 M L.T. 155 ; 14 Ind.Cas. 705 = 23 M.L.J. 61 = 11 M.L.T. 427.]

APPEALS against the decree of T. Ramasami Ayyangar, Subordinate Judge of Madura (West), in original suit No. 40 of 1895.

Plaintiff No. 1 claimed to be entitled by hereditary right to the offices of Nagara Mutharai and Kattyam in a temple and **[279]** to the villages constituting the endowment of the offices, *viz.*, Vandavasi and Thandayanendal. Plaintiff No. 2 was a lessee from plaintiff No. 1 of the last-mentioned village which was in possession of defendant No. 7, the representative of another branch of the same family to which plaintiff No. 1 belonged. The case of defendant No. 7 was that he and his ancestors had

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* Appeals Nos. 81 and 83 of 1897.

the right to perform and did perform half the duties and enjoyed half the emoluments attached to the offices in question; he also pleaded estoppel and adverse possession. The remaining defendants were the members of the committee and the manager of the temple.

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It appeared that the branch of the family to which defendant No. 7 belonged had claimed half the offices and the endowments for nearly forty years and that, when the first plaintiff's father was dismissed in 1863, defendant No. 7 had been appointed to succeed him and placed in possession of that part of the endowments, of which he was not already in enjoyment; and that shortly after plaintiff No. 1 attained majority, *viz.*, on 2nd September 1872, an arrangement was come to between the two branches of the family, which was embodied in a document filed in the suit as Exhibit XXVIII. That document after setting out the names of the parties, *viz.*, plaintiff No. 1 and defendant No. 7 and their respective brothers and referring to the offices abovementioned as mirasi offices and describing the endowments attached to them, proceeded as follows:—

"That out of our ancestral mirasis above referred to the sons of "Seshayyan should enjoy the Rajakara Nagara Mutharai mirasi, attached "to the said Meenatchi Sundareswarar temple from Tamil 1st Tai up to "the end of Margali of the year Srimukha next, have the Mutharai "therefor in their hands and enjoy the food and other perquisites due "therefor; that the said Chinna Gurusami Ayyan, &c., should, until the "aforesaid time, be looking after Kalasanthi Kattyan duty and the "Rishabha Mutharai Nirvaga duty in Tiruppuvanam and enjoy the food "and perquisites due therefor, that in the same way year after each "sharer should lock after the duty of the other and enjoy the respective "perquisites that special incomes should be enjoyed by both in equal "shares that in respect of the money found short in the Meenatchi Sun-"dareswarar temple at Madura, we should make it good in equal portions "just like the Nirvaghis (servants); that in the event of losses like this "occurring in future we should make [280] good those too in equal "portions in the same way (......) the said Tiruppuvanam (......) amount "the said Seshayyan."

Since the date of this settlement the village of Vandavasi was in the enjoyment of the first plaintiff's family and the village of Thandayanendal in that of defendant No. 7. In original suit No. 108 of 1889 on the file of the Subordinate Court of Madura (East), the present defendant No. 7 sued present plaintiff and his two brothers and various tenants in occupation of the village of Vandavasi to establish his right to a moiety of that village and the proceeds thereof, claiming title on the ground that he discharged half of the duty attached to the offices above mentioned, and he relied upon the document just referred to which was filed as Exhibit Y. His claim was admitted by the present plaintiff as well as certain of the other defendants, and among other issues the third was framed as follows:—"Whether the plaintiff has been perform-"ing the duties of his office in his independent right and he participated "in the enjoyment of the property till 1295, as alleged by plaintiff, or "whether the plaintiff was employed to do the work for wages for a time "and received the income of the property only as such wages, as pleaded "by first defendant?" The Subordinate Judge as to this issue recorded the following finding:—"There is not an *iota* of evidence that the plaint-"iff's father or plaintiff's brother or plaintiff ever did work for the first "defendant's family for wages. On the other hand, the evidence shows "that plaintiff's branch enjoyed the village either conjointly with first

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"defendant's branch or in antagonism to it and never as its servant." In the result the Subordinate Judge held the plaintiff was entitled not to partition of the property but to a half share in the income. The decree was upheld (on appeal by the first defendant) by the District Judge of Madura who said, *inter alia*, as follows :—

"The principal ground of appeal urged on behalf of the appellant "(first defendant) is that the terms of the original grant, which the "Subordinate Judge accepted as proved, having established that the office "and its emoluments should be held without partition by the elder branch "of the family, the Subordinate Judge was not warranted in decreeing a "division of the income. It has also been urged that the grant being of the "nature of a grant for charitable purposes, the holder of the office had no "such proprietary interest therein as would enable him [281] to make "a disposition of the property, and that this being so, the arrangement "evidenced by Exhibit Y for partition of the property is inoperative and "invalid, and that the appellant cannot be prejudiced by the illegal or "improper acts of his predecessors in office.

* * * *

"In 1872 came the partition-deed, Exhibit Y, between plaintiff and "his elder brother and defendants Nos. 1 to 3 and their elder brother. "If this document is valid it is admitted on behalf of appellant that his "case must fail.

* * * *

"It is clear on the evidence that Exhibit Y was recognised and acted "on in a most unmistakable manner by all concerned therein including "the appellant.

"As regards the argument that the nature of the property is such "that no disposition could be made of it by the holder for the time being "it has not, in my opinion, been shown that the grant is of the character "contended for. The grant was given simply, as far as has been shown, "by way of emolument for the performance of certain services in the "Madura temple and has, in itself, nothing of a special character.

"No doubt the terms of the original grant precluded partition, and the "only question now remaining is whether, notwithstanding the conduct "of the parties since the partition of 1872, effect should now be given to "the original terms of the grant, and subsidiarily to the terms of the "renunciation-deed of 1829.

"It appears to me on consideration that this should clearly not be "done. The parties and their predecessors have now, for a long series "of years, agreed to ignore the original terms of the grant and the "renunciation of 1829. The latter certainly was not acted on since "about 1852, and was never so far as appears sought to be enforced. The "partition-deed of 1872 (Exhibit Y) was deliberately entered into between "all the then representatives of the family and has been recognized and "acted on not only by the parties themselves, but by the controlling "authorities since that date, and no valid or well-founded argument has, "in my opinion, been advanced at the bar to show that the Court is "bound to upset a family compact for the tenure of the property which "is the deliberate act of the parties themselves and which has now, "[282] for a considerable time, been acquiesced in and acted on by all "concerned."

On second appeal (No. 1895 of 1891) the High Court (COLLINS, C.J., and PARKER, J.) reversed the decree, and dismissed the suit making the following observations :—

"We observe that the plaint does not base the alleged right to "partition upon Exhibit Y, but upon plaintiff's right as a member of the "family to an equal share in the property or to an equal share in the "income, if the property itself cannot conveniently be divided. On "referring, however, to the terms of the grant as evidenced by Exhibits "XII and XII (*a*), we agree with the District Judge that it must be taken "that the office and its emoluments were to be held by the elder branch "and without partition, and this being so, it is clear that the agreement "evidenced by Exhibit Y was *ultra vires*.

"The indivisibility of the property was for the benefit of the office, "and it was not competent to the holder of the office to vary the trust. "As the income of the property which was itself inalienable, was for the "support of the holder of the office, it follows that a partition of the "income is as impossible as a partition of the property itself.

"The respondent's pleader endeavoured to support the decree on the "ground that the office itself had now passed into the possession of the "plaintiff who had acquired a title to it by adverse possession. In reply "to the cases quoted by the learned Advocate-General to show that the "trust was inalienable, it was urged that the case was not one of a trust "but of an office with emoluments attached thereto. We are not able to "see the distinction, but we do not think it necessary to go into the cases "which have been cited for the simple reason that we cannot allow the "plaintiff in second appeal to change the whole basis of his claim. His "claim was based in the plaint upon his alleged right as a member of the "family to demand a partition, and it is quite clear that, on that basis, he "cannot possibly succeed. The plaint so far from alleging adverse "possession, set up the joint possession of the office and its emoluments."

In the present suit the issues Nos. 3, 4, and 5 were as follows:—

"Whether the entire office in question belongs exclusively to first "plaintiff's family and was held by the elder branch, or whether it belongs "to the family of the first plaintiff and seventh **[283]** defendant and "the emoluments were enjoyed in two moieties by the two branches, and "whether the claim so far as it relates to the moiety of the office held by "the seventh defendant is barred by limitation.

"Whether the decree passed by the Madras High Court in second "appeal No. 1895 of 1891 is binding upon the defendants in this case "and whether first plaintiff forfeited his right to the office by the aliena-"tions he has made of the lands endowed for its support?

"Whether the first plaintiff by reason of his admission in original "suit No. 108 of 1889 is estopped from maintaining this suit and alleging "that the office should be held by the elder branch of his own family?"

As to these issues the Subordinate Judge recorded the following findings:—(1) "My finding is that the offices in question belong exclu-"sively to first plaintiff's branch, but that the emoluments were enjoyed "in two equal moieties." (2) "I am of opinion that the judgment in the "former suit is binding upon the defendants, and they are estopped by "*res judicata* from denying the first plaintiff's right to the office." (3) "At the date of the first plaintiff's admission in the former suit, his "right to the offices had not accrued as his elder brother Venkateswara "Ayyan was alive. It was only after his death in 1894 that the first "plaintiff became entitled to them. There is no principle of law or "justice by which his admission can prevent him from setting up his real "right when that right has accrued. I hold, therefore, that the circum-"stance of his having supported the seventh defendant's claim in the

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"former suit cannot operate as estoppel (*Mussumat Oodey Koowur* v. "*Mussumat Ladoo* (1))."

He accordingly passed a decree for the plaintiff declaring him to be entitled to the entire offices and decreeing that the defendants do put him in possession of the village of Thandayanendal. Against his decree these appeals were preferred on behalf of the members of the temple committee and defendant No. 7, respectively.

*V. Krishnasami Ayyar*, *Sundara Ayyar* and *Srinivasa Ayyangar*, for appellants.

*Rama Rau*, *Ramakrishna Ayyar* and *Seshachariar*, for respondents.

## JUDGMENT.

**[284]** The first plaintiff (who will hereafter be called the plaintiff as the second plaintiff was only formally joined) brought this suit to establish his right to the entire office or offices of Nagara Mutharai and Kattyam in the temple of Sri Meenatchi Sundareswarar at Madura and to recover from the possession of the seventh defendant the village of Thandayanendal, one of two villages, the profits from both of which form the emoluments of the offices aforesaid. The other village Vandavasi was already in the plaintiff's possession and it had been the subject of a previous suit, to which reference will soon be made. The plaintiff impleaded defendants Nos. 1 to 5 as the committee men and the sixth defendant as the manager of the devastanam in question, on the ground that they were supporting the seventh defendant in his usurpation of the offices in suit and the emoluments thereof. The seventh defendant set up his right to a moiety of the offices and of the emoluments, and apparently claimed to keep the village of Thandayanendal in his sole possession as the other village was in the plaintiff's possession. The Subordinate Judge, though he was of opinion on the merits that the seventh defendant was entitled to half the offices and half the emoluments, found that the question was *res judicata* against the seventh defendant by the final judgment of the High Court in the previous suit, and he therefore gave the plaintiff a decree declaring his right to the entire offices and the entire emoluments and directed the delivery by the seventh defendant of the plaint village, Thandayanendal, to the plaintiff. At the same time he issued an injunction to the other defendants not to interfere with the rights declared by the decree in the plaintiff's favour. In appeal No. 81 of 1897, the committee represented by defendants Nos. 2, 4, 5 and 6 appeal on the ground that they have full power to appoint to the offices in question, and that the plaintiff is a man of bad character and unfit to hold the office: and added to these grounds of appeal they champion the seventh defendant's cause and support his appeal which is appeal No. 83. Now, on the grounds which strictly appertain to themselves, that is, the power of appointment and the unfitness for office of the plaintiff they have no case whatever. As observed by the Subordinate Judge, they were hardly necessary parties to the suit, for they have no real power of appointment in themselves. They have simply to appoint to the offices the person hereditarily entitled to hold the same provided he is competent: and as to the **[285]** alleged unfitness of the plaintiff there was absolutely no proof, so that the committee's appeal may be dismissed *in limine*.

It remains to deal with the substantive appeal of the seventh defendant. In the previous suit which was original suit No. 108 of 1889

(1) 13 M. I. A. 585 (600).

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terminating in second appeal No. 1895 of 1891 in this Court, the seventh defendant was the plaintiff and the present plaintiff was the second defendant. Therein the seventh defendant claimed his right to a moiety of the offices and the emoluments, and this very plaintiff in that suit admitted the seventh defendant's right, and both the Court of First Instance and the Lower Appellate Court found in favour of the right. The High Court, however, dismissed the seventh defendant's claim on the ground that the offices and the emoluments were indivisible, and went by right to the older branch of the family to which the plaintiff does and the seventh defendant does not belong. The seventh defendant urged in support of the decrees of the Lower Courts in his favour that whatever the original grant might have been, yet he had acquired a title to the moiety of the offices and the emoluments by adverse possession for over twelve years. The learned Judges who heard that case however refused to hear him on that point, because they considered that he had not alleged it as the basis of his claim. In this suit, however, he has alleged adverse possession as the basis of his defence and we are unable to agree with the Subordinate Judge in his statement that the High Court decided in the previous suit that there was no adverse possession and so the subject was *res judicata*. As already observed, the High Court refused to decide upon that question and all they did decide on this point was that they would not hear it as it had not been pleaded in the plaint. The plaintiff's vakil thereupon urges that whether the point was decided or not the seventh defendant ought to have made it a ground of attack in his previous suit and by his omission to do so he is now barred from setting it up under the terms of Explanation II of Section 13 of the Code of Civil Procedure. If it were certain that the claim by adverse possession had not been made in the previous suit, the provision of law quoted might operate as a bar; but we find on a perusal of the judgments in the previous suit that on the question raised by the third issue in that suit as to whether the seventh defendant enjoyed the offices and the property in his independent right, or as a servant for wages, the question of the character of **[286]** the seventh defendant's possession was necessarily brought into consideration, and it was found by both the Courts that he had long enjoyed half the offices and either the whole or half of the village then in suit adversely to the plaintiff's family. So that it cannot be said that this right by adverse possession was not made a ground of attack in the former suit. Now upon the evidence in this suit there is not a shadow of doubt that from at least the year 1863 onwards, the seventh defendant has been in adverse possession of a moiety of the offices and the emoluments. It is not so clear whether there had been adverse possession previous to 1863, though there is ample proof that the seventh defendant's branch of the family were claiming as of right half the offices and the property so far back as 1858 (see Exhibit CXXXIX). In 1863 when the plaintiff's father was dismissed, the Collector appointed the seventh defendant and his brother to the entire offices and registered the two villages Thandayanendal and Vandavasi in their joint names (Exhibits LXIII and LXVIII) and put them into actual possession of the plaint village Thandayanendal; and it would appear that they were not put into possession of the other village Vandavasi which was then registered in their name because they already had possession of it. The plaintiff was then ten years old and became of age in 1869, the age of majority at that time being 16. His right to sue for the recovery of the offices and the villages which

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had been given to others in 1863 began in that year, and the period of limitation then was six years. But as the plaintiff was a minor he had three more years after he came of age to sue, *i.e.*, until 1872. In 1872, when the seventh defendant and his brother had been in adverse possession for nine years and their title by prescription was becoming almost ripe, a settlement was come to as evidenced by Exhibit XXVIII, by which the plaintiff's branch of the family were to take half the offices and the emoluments and the seventh defendant's branch the other half, the actual arrangement being that the offices should be held in rotation and the lands in equal shares. The adverse possession of the seventh defendant which had commenced in 1863 and was nearly perfected in 1872 in respect of the entire offices and the property was thereafter continued and has continued up to date, which is, of course, much longer than the statutory period, with respect to a moiety of the offices and the property. The effect of the arrangement in 1872 thus was the giving up by the seventh defendant [287] of half of the right, the whole of which he was on the point of acquiring by prescription.

As to the law, it is clear that the right to an office such as this with its emoluments can be acquired by adverse possession as such a right is treated like the right of the manager of a temple or an uraima right as a personal right where there is no question of the malversation of the trust property. (*Balwant Rao Bishwant Chandra Chor* v. *Purun Mal Chaube* (1), *Nilakandan* v. *Padmanabha* (2)), and *Lakshmi Ammah* v. *Kesavan* (3). So that although it has been held in the previous case that the offices and emoluments ought to have been held indivisibly, yet we must find that another has acquired a divisible right to a moiety by twelve years' adverse possession, and that plaintiff's right thereto is extinguished. (Article 124 of the Second Schedule of the Limitation Act and Section 28 of the same Act.)

We therefore, allow the appeal of the seventh defendant that he is entitled to one half of the offices and the emoluments in question in this suit, and the plaintiff will hence be entitled to a decree for only the other half. The injunction and the order as to the seals contained in the Lower Court's decree have, in view of our decision become unnecesary; and certain manyams which were claimed in the plaint were also wrongly included in the decree of the Subordinate Judge as the claim to them had been abandoned in the suit. The decree must be modified accordingly. The simplest way to give effect to our judgment will be to set aside the whole decree of the Subordinate Judge's Court and to substitute a decree to the following effect—that the plaintiff be declared entitled to half the offices of Nagara Mutharai and Kattyam as described in the plaint and that the seventh defendant do forthwith put him in possession of half those offices, together with half of the village of Thandayanendal hereunder described. The parties having lost and gained equally will bear their own costs throughout. The costs in the Lower Court of defendants Nos. 1 to 6 may be paid out of the temple funds; but their costs in this Court must be paid by themselves out of their private funds, as their appeal was uncalled for, inasmuch as it was sufficient for the seventh defendant to have appealed.

(1) 10 I.A. 90. (2) 14 M. 153.
(3) Second Appeal No. 500 of 1890 (unreported).

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## [288] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

RAMANADAN CHETTI (*Plaintiff*), *Appellant v.* PULIKUTTI SERVAI AND OTHERS (*Defendants Nos.* 1 *to* 38 *and* 1*st Defendant's Representative*), *Respondents.**
[1st and 3rd February, 1898.]

*Ejectment suit—Title to relief completed pending a suit—Amendment of plaint.*

A having leased land to B, sold it to C. Persons having trespassed, B offered no objection, and it was alleged that he was in collusion with them. C now sued before the expiry of the lease to eject the trespassers; the lease expired while the suit was still pending:

*Held*, that the plaintiff was not entitled to the relief sought and could not be permitted, on appeal, to amend the plaint by adding a prayer for a declaration of his reversionary right, although the acts of the defendants were such as to be prejudicial to his rights as reversioner.

[**F.**, 5 Ind. Cas. 699=6 N.L.R. 17 (20); **R.**, 6 C.L.J. 74=11 C.W.N. 732; 8 Ind. Cas. 736 (738); 19 M.L.J. 307=5 M.L.T. 213; 5 N.L.R. 136 (140)=3 Ind. Cas. 923; **Cons.**, 15 Ind. Cas. 146 (155)=(1912) M.W.N. 669; **D.**, 6 A.L.J. 177; 8 Ind. Cas. 844=9 M.L.T. 205 (206).]

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East), in original suit No. 40 of 1895.

This was a suit relating to property described in the plaint as eight items of land. In 1894 they were all the property of defendant No. 1. On the 1st of June in that year items Nos. 1 to 7 were sold by him to Sowmianarayana Ayyangar, who on the 8th leased them for a period of ten years to defendant No. 1, who gave item No. 8 as security for the rent. In the following month Sowmianarayana Ayyangar sold to the plaintiff items Nos. 1 to 7 and assigned to him his rights under the lease. The plaint after setting out these facts proceeded to state that certain of the defendants had unlawfully entered upon the property in collusion with the village raiyats (who were also joined as parties) with the intention of defrauding the plaintiff, and of creating evidence of title in themselves. It was also alleged that defendant No. 1 who had refused to join in the suit was in collusion with the other defendants intending to defraud the plaintiff of his right to a charge on item No. 8. The prayers of the plaint were as follows:—

"It is therefore prayed that a decree may be passed—

"1. Directing the defendants Nos. 2 and 3 and defendants from "the fourth to hand over the possession of the suit properties "[289] to plaintiff so that first defendant may enjoy items Nos. 1 to 7 "for Fasli 1305 alone on behalf of the plaintiff, and so that plaintiff, "may enjoy them thereafter, and so that item No. 8 may be enjoyed by "first defendant subject to the plaintiff's security aforementioned.

"2. That the said defendants be restrained by a permanent injunc-"tion from entering upon the said properties.

"3. That mesne profits from Fasli 1306 be paid to plaintiff with "interest.

"4. That costs of the suit with interest thereon be paid to plaint-"iff.

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"5. And that such further or other relief as the nature of the suit "may require be granted."

The suit was filed on the 15th of August 1895 while the lease to defendant No. 1 was still current. It, however, expired while the proceedings were pending. The Subordinate Judge passed a decree on the 13th of April 1896 dismissing the suit on grounds which are immaterial for the purposes of this report.

The plaintiff preferred this appeal.

*V. Krishnasami Ayyar* and *Srinivasa Ayyangar*, for appellant.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*) and *Sundara Ayyar*, for respondents Nos. 2 and 3.

Respondents Nos. 4 to 39, were not represented.

## JUDGMENT.

The property in dispute in this case consists of 12 pangus or shares in an Inam village. The lands appertaining to the shares are in the occupancy of raiyats who own the Kudivaram right. The shareholders or Inamdars are the Melvaramdars and as such are entitled to take their share of the crops and enjoy the other incidents appertaining to the tenure. Admittedly, the plaintiff's vendor had, before the sale to the plaintiff, granted a lease of the shares in dispute to the late first defendant for Faslis 1304 and 1305. The present suit was instituted before the expiration of the term of the said lease and while it remained in force. The plaintiff claimed a decree for possession of the shares against the contesting defendants who, it was alleged, had ousted the first defendant, the lessee. On behalf of the defendants it was objected that the plaintiff's suit as framed was unsustainable, the lease being treated in the plaint itself as subsisting and valid. The Subordinate Judge overruled the objection. But we cannot agree with him, as he has overlooked the elementary rule that a plaintiff who seeks possession must show that at the date of the [290] suit he was entitled to such relief (Code on Ejectment, page 66). The observations of Sir Barnes Peacock in *Davis* v. *Kazee Abdool Hamed* (1) are a direct authority that in this country also a landlord in the position of the plaintiff could not sue to eject even a trespasser so long as the lease is outstanding. The case of *Bissesuri Dabeea* v. *Baroda Kanta Roy Chowdry*(2) cited by the Subordinate Judge does not lay down a rule to the contrary, and if it did, the decision could not be held to be sound. As we understand that case, the Court there only held that as the plaintiff had been deprived of the joint possession he had held with his nimhowladar he was entitled to be restored to such possession. Clause (*n*) of Section 108 of the Transfer of Property Act, on which also the Subordinate Judge relies no doubt imposes an obligation on the lessor to put the lessee in possession. But that provision certainly cannot be construed as affecting the rule of procedure that a plaintiff suing for possession must show that at the date of the suit he was entitled to that relief.

On behalf of the plaintiff, it was urged here that even if, at the date of the suit, the plaintiff's claim for possession was unsustainable, still as the term of the lease expired during the pendency of the litigation, the plaintiff might now be given a decree for possession, should his case be

(1) 8 W. R. (C. R.) 55 (58). (2) 10 C. 1076.

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shown to be well-founded on the merits. The cases of *Sakharam Mahadev Dange* v. *Hari Krishna Dange* (1) and *Sangili* v. *Mookan* (2) on which the learned pleader for the plaintiff laid stress in support of the above contention do not warrant the course suggested by him being adopted in cases like the present. If in suits for partition under the Hindu Law events occurring after the commencement of the action are to be considered in determining the rights of the parties, such cases must be treated as an exception to the general rule that the rights of parties must be ascertained as at the date of the action brought. (Compare the observations of Collins, J., in *Ruys* v. *Royal Exchange Assurance Corporation* (3)).

It seems to be clear therefore that the plaintiff's suit for possession was not maintainable in consequence of the existence then of the outstanding term under the lease to the late first defendant. **[291]** It was next urged for the plaintiff that the dispossession of the first defendant was on a claim of title which was inconsistent with the plaintiff's right to the reversion and such relief as would protect that right might and ought to be given in this suit. The relief appropriate in such circumstances would be a declaration (Per Peacock, C. J., in *Womesh Chunder Goopto* v. *Raj Narain Roy*(4)). But as the plaint was framed upon an erroneous view of the plaintiff's rights, no declaration was prayed for with reference to the view of the matter just stated, and the case is not one in which the plaintiff should be allowed to amend at this stage of the litigation, especially because even after such an amendment the case cannot be decided in favour of the plaintiff without taking further evidence as to whether Exhibit C, which is the very first link in the chain of the plaintiff's title, was executed by the parties who are alleged to have executed it, but which evidence the plaintiff had failed to call without, so far as appears, any proper reasons for such omission.

In these circumstances there is no alternative left but to dismiss the suit on the preliminary ground stated above. The appeal, therefore, fails and is disallowed with costs.

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**21 M. 291 = 8 M.L.J. 137.**

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

ITTAPPAN (*Plaintiff*), *Appellant* v. PARANGODAN NAYAR AND OTHERS (*Defendants*), *Respondents*.* [22nd March, 1898.]

*Transfer of Property Act—Act IV of* 1882, *Section* 59—*Oral agreement for kanom—Suit for ejectment by a jenmi.*

A jenmi in Malabar sued to eject a tenant, who proved by oral evidence that he had one year before suit paid to the plaintiff a sum of money as a renewal fee and the plaintiff agreed to demise the land to him on kanom for a period of twelve years :

*Held*, that, although no instrument has been executed and registered, the plaintiff was not entitled to eject the defendant.

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* Second Appeals Nos. 1646 and 1647 of 1896.

(1) 6 B. 113.
(2) 16 M. 350 (353).
(3) [1897] 2 Q. B. 135 at p. 142.
(4) 10 W.R. C.R. 15 (19).

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[Overruled, 29 M. 336=16 M.L.J. 395=1 M.L.T. 153 (F.B.); F., 13 C.P.L.R. 163; D., 17 C.P.L R. 21.]

[292] SECOND appeal against the decree of J. A. Davies, District Judge of South Malabar, in appeal suit No. 238 of 1895, confirming the decree of P. P. Raman Menon, District Munsif of Nedunganad, in original suit No. 456 of 1893.

The plaintiff sued to recover, with arrears of purapad, twenty-three items of land alleged to be the jenm property of his tarwad and to have been let on an improving lease to the defendants' assignor. The document tendered in evidence of that lease was found to be forgery. The defendants however admitted the plaintiff's title as landlord, and their case was that, in September 1892, the defendant had paid a renewal fee to the plaintiff and that the latter agreed to demise to him the land on kanom under which he claimed to be entitled to hold it for a period of twelve years. This agreement was established by the evidence, but the District Munsif held that it did not constitute a bar to the suit for ejectment for the reason that the terms were not proved to be sufficiently definite to be specifically enforced. He accordingly passed a decree for the land. The District Judge was of opinion that the agreement was not indefinite and really afforded an answer to the claim, and accordingly he reversed the decree and dismissed the suit.

The plaintiff preferred this second appeal.

*Sundara Ayyar*, for appellant.

Mr. *C. Krishnan*, for respondent No. 1.

*Ryru Nambiar*, for respondent No. 29.

JUDGMENT.

It is argued for the appellant that the whole of the renewal fees was not paid by the defendants. That, however, was not plaintiff's case in the Court of First Instance, nor is it a ground of appeal to this Court. The contention of the plaintiff was simply that the money paid was not paid as renewal fee, but as rent. The Courts found that it was paid as renewal fee. No question was raised as to whether the payment was the full fee or only a part of it, and we cannot allow the plaintiff's present contention that it was only part of the fee to be now maintained. We find that the full fee was paid. Then it is argued that a lease of the kind agreed upon between the parties can only be made by a registered instrument, and that, as no such instrument was executed in this case, the plaintiff can maintain the present suit in ejectment. In support of this plea reliance is placed on a *dictum* [293] in the case of *Papireddi* v. *Narasareddi* (1). That *dictum* has been doubted by the Full Bench of the Allahabad High Court (*Begam* v. *Muhammad Yakub* (2), and by a Divisional Bench of this Court (*Pangi Achan* v. *Parameswara Patter* (3) ). We must also say that we find difficulty in accepting it as correct, although, as pointed out by Edge, C. J., the decision could be supported on the ground that in that case the defendant had unsuccessfully brought a suit for specific performance and had in it set up a contract which differed from the actual contract. In the present case the plaintiff brought his suit for ejectment before the expiration of the time within which the defendants might have sued for specific performance of the contract to renew the lease. In such a case to allow the plaintiff to eject the lessee

(1) 16 M. 464. (2) 16 A. 344.
(3) Second Appeal No. 730 of 1894 (unreported).

would, in our opinion, be to give the plaintiff a decree in fraud of his contract of lease. We, therefore, agree with the Lower Appellate Court that the plaintiff's suit was premature, and we dismiss this second appeal No. 1646 of 1896 with costs.

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APPELLATE CIVIL.
21 M. 291 = 8 M.L.J. 137.

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**21 M. 293 = 1 Weir 738.**

## APPELLATE CRIMINAL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.*

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QUEEN-EMPRESS *v.* AYYAKANNU MUDALI.*
[16th February, 1898.]

*District Municipalities Act (Madras)—Act IV of* 1884, *Section* 189—*Keeping a private cart-stand without a license.*

It is not necessary, in order to establish the offence of using a place as a cart-stand without a license under District Municipalities Act IV of 1884 (Madras), Section 189, to prove that the cart-stand is offensive or dangerous or that fees are levied there.

APPEAL on behalf of Government under Criminal Procedure Code, Section 417, against the judgment of acquittal pronounced by P. Rajagopala Chari, Second-class Magistrate of Chengam, in calendar case No. 220 of 1897.

**[294]** The accused was charged with the offence of keeping a private cart-stand without a license within the limits of a municipality under District Municipalities Act IV of 1884 (Madras), Section 189, amended by Act III of 1897. The Magistrate said :—" It is pleaded, on behalf of the " accused, that the place cannot be considered as a cart stand in the sense " used in the Act, as no fees are levied, and that the place exists purely for " purposes of facilitating his trade as a broker. It is alleged that carts " bringing paddy, &c., for his bazaar stay there temporarily until the price " of the article is settled, the brokerage due to him being either deducted " at once on the spot or adjusted subsequently between himself and the " bandyman. The Sanitary Inspector has been examined as an only " witness for the prosecution. He swears that, after a license has been " applied for and refused, to the accused, a large number of carts was " allowed to stand on the site belonging to the accused on the 17th and " 18th April ; but, when he visited it, he further found the place uncleanly " and otherwise objectionable from a sanitary point of view . . . The " question now for my consideration is whether, in the circumstances " described by the accused, he is liable for an offence under the Municipal " Act. In my opinion, he is not liable ; Section 188 of the Act and the " following sections purport apparently to make provision against offensive " and dangerous trades being carried on in a municipality. The trade " carried on by the accused, *viz.*, that of receiving brokerage in the circum" stances represented by him, is certainly not a trade falling under either " of the above two categories ; for the trade by itself is neither offensive " nor dangerous."

The present appeal was preferred on behalf of Government.

The Public Prosecutor (Mr. *E.B. Powell*), for the Crown.

*Pattabhirama Ayyar*, for the accused.

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* Criminal Appeals Nos. 14 and 15 of 1898.

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APPELLATE CRIMINAL.

21 M. 293 = 1 Weir 738.

## JUDGMENT.*

We do not agree with the Sub-Magistrate that it is necessary for the prosecution to prove that a cart-stand is "offensive" or "dangerous," or that fees are levied in the cart-stand in order to justify a conviction under Section 189 of the Madras District Municipalities Act IV of 1884, though, no doubt, those are matters regarding which the Court would usually require evidence to be given in order to guide it in finding whether the alleged cart-stand is such as the section contemplated and also to guide it in passing sentence in the event of conviction.

[295] The heading "Offensive and Dangerous trades" is manifestly not exhaustive of the matters dealt with in the succeeding sections, nor can it be taken to restrict the plain terms of the sections. Again, the levying of fees is not necessary in order to constitute a place where carts stand a "cart-stand" within the meaning of the section. On the other hand, we think that a place is not necessarily a "cart-stand" within the meaning of the section, merely because one or more carts stand there. It cannot have been intended to apply to the keeping, let us say, of one or two carts on the premises of the owner of the carts any more than the words "horse lines" in the same section can be held to include the ordinary stables attached to a dwelling house. The term must be construed reasonably with due regard to all the circumstances of the case, *e.g.*, how many carts use the place from time to time, whether they belong to one or more persons, whether fees are levied, how long the carts remain there, and the purpose for which they go there, whether for the sale of goods to the owner of the premises or to others, or for the purpose of being engaged for hire, and so forth.

In the present case it appears that the place was licensed as a cart-stand last year, but that the municipality refused to renew the license this year for some reason which is not stated. It also appears that as many as thirty carts are found there at one time, and that they belong to different persons, and, according to the first witness for the defence, carts for hire go there and carts from that place go for hire elsewhere. These facts would seem to indicate that the place is used as a cart-stand within the meaning of the section. These matters have not been sufficiently considered by the Magistrate.

We, therefore, resolve to set aside the acquittal and direct the Magistrate to re-try the case, taking further evidence as to the character of the alleged "cart-stand," and to dispose of the case according to law and with reference to the above remarks.

† [*In criminal appeal No.* 15 *of* 1898.—The attorney for the accused in criminal appeal No. 15 of 1898 states that the evidence is similar to that in criminal appeal No. 14 of 1898, and the Magistrate in his judgment states that for the reasons given in the latter case he acquits the accused in this case also.

We set aside the acquittal and make the same order as we have just made in criminal appeal No. 14 of 1898.]

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* Criminal Appeal No. 14 of 1898—ED.

† The paras. in rectangular brackets form portion of the judgment, though omitted in the I.L.R.—ED.

21 M. 296 = 1 Weir 135 & 792.

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## [296] APPELLATE CRIMINAL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

QUEEN-EMPRESS *v.* POOMALAI UDAYAN.*
[26th January, 1898.]

*Penal Code—Act XLV of* 1860, *Sections* 99, 186, 353—*Local Boards Act* (*Madras*)—*Act V of* 1884, *Sections* 77, 78, 81, 94, 163—*Service of notice of demand of house-tax—Omission to fill up the house-register completely—Illegal distraint—Resistance to distraining officer.*

A notice of demand of a house-tax under the Local Boards Act V of 1884 (Madras) was affixed to the house. The owner, who was a potter and cultivator by occupation, was in the village at the time. He did not pay the tax. A warrant of distress was issued, the house-register not having been completely filled up, and a bucket and spade belonging to the defaulter were attached. The defaulter successfully resisted the distraint:

*Held*, that the provisions of the Act had been sufficiently complied with as regards the preliminary steps for making the demand and the service of notice, and the fact that the spade and the bucket were protected from attachment under Section 94 did not justify the resistance, and accordingly that the defaulter was guilty of offences under Penal Code, Sections 186 and 353.

[R., 27 A. 499 = 2 A.L.J. 219 (221) = A.W.N. (1905) 74.]

APPEAL on behalf of Government under Criminal Procedure Code, Section 417, against the judgment of acquittal pronounced by T. Varada Rau, Assistant Magistrate of South Arcot, in criminal appeal No. 20 of 1897, preferred against the judgment of V. Ponnambala Mudaliar, Stationary Second-class Magistrate of Kallakurichi, in calendar case No. 95 of 1897.

The accused, who was a potter and a cultivator by occupation, was tried and convicted in the Court of the First Instance of the offences of voluntarily obstructing a public servant in the discharge of his public functions under Penal Code, Section 186, and using criminal force to a public servant with intent to deter a public servant. The South Arcot District Board, under the Local Boards Act V of 1884 (Madras), Section 60, notified that a tax on all houses situated within Kallakurichi Union should be levied at the full rates specified in Schedule A of the Act. The accused failed to pay the tax due on his house after service of a notice of demand. A warrant or distress was then issued and a bucket and spade belonging to him which was found within his house were attached. The distraint was resisted by the accused who recovered and retained these articles. There had been an omission to fill up [297] one column of the house-register and it was objected that the service of notice of demand was irregular and also that the articles attached were not liable to distraint. On these grounds the Magistrate on appeal who referred to *Queen-Empress* v. *Kalian* (1). *Queen-Empress* v. *Pukot Kotu* (2) *Queen-Empress* v. *Tulsiram* (3). *Rakhal Chandra Rai Chowdhuri* v. *The Secretary of State for India in Council* (4), and *Cohen* v. *Nursing Dass Auddy* (5), reversed the conviction holding that the charges had not been substantiated. As to the second point he said: "Section 163, "Clause (1), gives the manner of service of notice regarding any money due "in respect of assessment or tax. It shall, if practicable, be presented to

* Criminal Appeal No. 792 of 1897.

(1) 19 M. 310. (2) 19 M. 349. (3) 13 B. 168 (170).
(4) 12 C. 603. (5) 19 C. 201.

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"or served personally upon the person to whom the same is addressed "... In this case the demand notice is said to have been pasted on "the wall of the appellant's home by the monigar on 3rd December 1896. "The appellant, it is admitted, was in the village and in fact in the house "three hours before the monigar appeared. The question is, should any "attempt be made to discover or find the person to whom the notice is "addressed or would his mere absence from his usual place of abode or "business suffice, to adopt the other modes of service specified in the "section quoted above."

The present appeal was preferred on behalf of Government.

The Public Prosecutor (Mr. *E. B. Powell*), for the Crown.

*Mahadeva Ayyar*, for the accused.

## JUDGMENT.

Upon the facts, we agree with the finding of the Subordinate Magistrate that there was a resistance by the accused to the attachment, and we cannot agree with the Assistant Magistrate that such resistance was not proved. The evidence of the Union servants is corroborated by the probabilities as well as by the official report that was submitted at once, and it is impossible to believe the defence story that the Chairman of the Union with a large escort should have come to make the distraint and then have gone away without doing so, although there was no resistance.

The next question is whether the resistance was lawful as has been ruled by the Assistant Magistrate on the ground that the provisions of the Local Boards Act (V of 1884) under which the distraint was made were not regularly complied with in regard to (1) the preliminary steps for making the demand, (2) the service of the notice, and (3) the subjects of seizure. In regard to (1) the **[298]** only defect appears to have been an omission to fill up one column in the house-register, which defect may be taken to be cured by Section 155, Clause (1) of the said Act (V of 1884) inasmuch as the provisions of the Act were in substance and effect complied with. The Assistant Magistrate was wrong in saying that no house-register was kept, and also in saying that it is not shown the demand notice was served ten days after the tax was payable, because the Chairman gives evidence proving both these points. In regard to (2) we consider that there was no real departure from the procedure prescribed in the Act (V of 1884) for the service of notices. As regards (3) we must admit that the articles seized—a spade and a bucket—were either tools of an artisan, such as a potter or implements of husbandry, and were therefore exempt under Section 94 of the Act (V of 1884) from attachment. The question then is whether this circumstance justified the resistance, and rendered it no offence. We clearly think that it did not as the act, however irregular or illegal it may have been, was the act of a public servant acting in good faith under colour of his office, and against such an act, the accused had no right of self-defence under Section 99 of the Penal Code, inasmuch as there was no apprehension of death or of grievous hurt. This case is governed by the rulings of this Court in several previous cases (*Queen-Empress* v. *Ramayya* (1), *Queen-Empress* v. *Pukot Kotu* (2) and *Queen-Empress* v. *Tiruchittambalapathan*, (3). The case, *Queen-Empress* v. *Tulsiram* (4), referred to by the Assistant Magistrate, was a case in which it was found that the person acting was in effect

(1) 13 M. 148. (2) 19 M. 349. (3) 21 M. 78. (4) 13 B. (168) 170.

not a public servant. The other case, *Queen-Empress* v. *Kalian* (1), has no application here, the question there being only in regard to the lawfulness or otherwise of the custody from which the accused escaped.

We must therefore set aside the judgment of acquittal passed by the Appellate Court and uphold the conviction of the accused under Sections 186 and 353 of the Penal Code. As regards the sentence of two months' rigorous imprisonment and Rs. 50 fine imposed by the Subordinate Magistrate, we consider it to be excessive as no violence was used. We reduce the imprisonment to the 26 days' imprisonment, which the accused has already undergone and remit the fine which, if paid, must be refunded.

Ordered accordingly.

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**21 M. 299 (P.C.) = 25 I.A. 84 = 7 Sar. P.C.J. 313.**

## [299] PRIVY COUNCIL.

PRESENT:

*Lords Hobhouse, Macnaghten and Morris, and Sir R. Couch.*

[*On appeal from the High Court at Madras.*]

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RAJA VELLANKI VENKATA RAMA RAU (*Plaintiff*), *v.* RAJA PAPAMMA RAU (*Defendant*). [17th February and 8th March, 1898.]

*Construction—Title under a will followed by a family arrangement adding to the property devised.*

The will of a proprietor, who died in 1864, disposed of a zamindari, and of one village within it, as two distinct properties, giving the zamindari to the testator's two widows, and, on the other hand, giving the village in equal shares, in perpetuity, to the two brothers of his junior wife. Neither of the two brothers took possession of their respective moieties on the testator's death, and the whole village was treated for some time as part of the zamindari, the profits of it being received by, or on behalf of, the widows. In 1869, one of the brothers having died, leaving a son, who succeeded to his rights in the village, a family arrangement was made that the entirety of it should be made over to the surviving brother, the present claimant, the son of the other receiving from the widows satisfaction in lieu of his moiety.

The junior widow having died, the senior got possession of the village, alleging that the surviving brother had merely been appointed to act as manager of it, on behalf of herself and her co-widow:

*Held*, that under the will the claimant had been originally entitled to one-half of the village including its rents, from the testator's death; and that to this half had been added the other, with title, in 1869, in pursuance of the transaction in regard to it. An order, given by the widows in that year making over the village, was not a revocable one; and the interest in the additional half conferred upon the claimant, was commensurate with what was already his own. No writing was then necessary to vest the other half in him. Such a transaction was good and valid as a family arrangement; and he had made out his title to the whole village.

[R., 29 M. 437 = 16 M.L.J. 178 (220).]

APPEAL from a decree (15th March 1892) of the High Court, reversing a decree (29th June 1889) of the Subordinate Judge of Ellore.

This suit was brought on the 7th February, 1888 by Raja Vellanki Jagannatha Rau, who died in that year, and was succeeded on the record by his son, Raja Vellanki Venkata Rama Rau, to obtain possession of a

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(1) 19 M. 310.

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village, Vundrazavaram, as entitled to the proprietary right. This village formed part of a zamindari belonging to Raja Narayya Appa Rau, who died on the 7th December **[300]** 1864, having by his will bequeathed half of the village to the plaintiff, Jagannatha Rau, and the other half to Sura Rau, both being brothers of the testator's junior wife. The zamindari, Nidudavolu, by the same will was separately given to the late Raja's two widows, Papamma, the senior, and Chinnama. The younger widow died before 1883, in which year Jagannatha, who had received possession, of which the character was now disputed, was dispossessed of the village by Papamma, against whom he brought this suit to recover it.

The principal question raised by this appeal was whether the plaintiff had obtained a title to the village, as the first Court had decided, or had as manager only on behalf of the widows obtained a possession to which the surviving widow had lawfully put an end. The High Court had taken the latter view, and had held that any claim by the plaintiff under the will of 1864 was barred by time. The question was mainly as to the character and capacity in which the plaintiff had held the village while in possession from 1869 down to 1883 when he was dispossessed. The answer to this turned on the proper conclusion to be drawn from the facts stated in their Lordships' judgment.

The late Raja's bequest to the brothers was in these terms:—" To " my brothers-in-law, Jagannatha Rau and Sura Rau, the village of Vundarazavaram. It is settled that they should be paying every year as by " kistbund (instalments) the peshcush, and be enjoying the profits from " their sons to grandsons, and so on in succession."

The will gave the widows a power to adopt which was exercised in the adoption of Venkata Ramayya, who dying left a son Narayyan. The latter was made a defendant, and was a party to this appeal, but he died in 1895. Papamma under an order, dated 7th January 1897, represented him as his guardian. On his death she was the sole respondent.

No steps were taken to carry the Raja's bequest of the village into effect until 1869. At that time Sura Rau had died leaving a son, Venkata Krishna Rau, and in that year it was arranged that a separate provision should be made for the latter.

In 1869 possession of the whole village was given to Jagannatha alone, an order, dated 22nd January 1869, signed by the two widows, having been given by them to an amildar of the zamindari in the following terms: —" Sanction having been given that out of **[301]** Rs. 6,400, the " annual rent fixed on the village of Vundrazavaram, included in the Parganna " of Nidudavolu, Rs. 3,200 should be paid annually to the Sircar, and the " balance of Rs. 3,200 enjoyed by Vellanki Jagannatha Rau Garu as " vasati, and that he should be managing the affairs of that village, the " management of that village should be delivered to the man sent by him, " and arrangements made so that he may get business managed on his " behalf. If the collections already made for the present year are in excess " of Rs. 3,200, payable to the Sircar, such excess should be made over to " him, and a receipt taken. But if they fall short of Rs. 3,200, the deficit " should be recovered from him, and further the sum of Rs. 3,200 should " be collected from the ensuing year according to the kists of the Parganna. " Moreover, the water-cess and the road-cess charged according to the rules " for that village, in proportion to its extent, should every year be collected " through Jagannatha Rau Garu himself, and arrangements made for that " sum being remitted to the Tana. Therefore, the money relating to the " said items, as may be found due every year according to the accounts,

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"should be collected from him according to the kists. We have arranged "to collect through him alone also the past arrears outstanding on that "village up to date, and this matter too is, therefore, made known to "you."

The plaint, alleging title under the will of the Raja, stated that possession was held by the plaintiff from the 29th January 1869 till 1883 when the raiyats, at the instigation of Papamma, began to withhold their rents; and that he was finally deprived of possession in 1886. The defendant Papamma asserted in her written statement that the plaintiff had not obtained possession under the Raja's will, but by her permission and that of her deceased co-widow, on condition that he should pay an annual rent of Rs. 3,200; the understanding being that his possession should continue only so long as he did their behests, to which he had not attended. That her co-widow, who died on the 15th April 1881, had in 1878 joined with her in requiring possession of the village. The statement filed on behalf of the other defendant Narayyan was to the same effect, with a further allegation that the Raja could not alienate property that was ancestral in his line.

The issues raised the above questions.

The Subordinate Judge was of opinion that the plaintiff's representative had made out a title to the village. The widows [302] had granted possession of it, with the consent of the son of Sura Rau, the co-legatee, to Jagannatha, who entered into occupation of it. He considered that the widows did so, being inclined to act according to the will of their late husband, whose directions they were bound to carry out. Their making over possession was not a mere act of grace on their part; but they, being under an obligation to carry out the will of their late husband, had delivered over the property bequeathed by him to Jagannatha; in so doing adding the share which the co-legatee's son consented to abandon. The Judge referred to Lord Chancellor Talbot's expression in *Lechmere* v. *Earl of Carlisle* (1) that when a man lies under an obligation to do a thing it is more natural to ascribe his act, in so doing, to the obligation under which he lies, rather than to a voluntary grace independent of the obligation. He cited also Snell's Equity, 10th edition, page 264. He accordingly awarded possession of the village to the claimant.

The High Court reversed this decree, being of opinion that the claimant had not obtained possession of the village under the will, but by the act of the widows, who had put him in occupation as a manager only, and had lawfully put an end to the management. The Judges (COLLINS, C.J., and PARKER, J.), besides adverting to other evidence to that effect, referred to letters addressed by Jagannatha to his sister the Rani Chinnamma, and considered that they contained "an unequivocal "admission that the writer could only hold the village for the short "remainder of his life, and was liable to be called upon to surrender it at "any time at the will of the Rani." This they regarded as in accordance with the terms under which possession was given under the order of the 22nd January 1869, signed by the widows. The alleged title rested upon the will, and, so founded, was barred by time.

On an appeal by the plaintiff, Mr. *J. D. Mayne*, for the appellant, argued that the High Court had not drawn the right conclusion from facts as to which the evidence, taken altogether, left no doubt. The

(1) 3 P. Wms., 211; Cases *temp.* Talbot, 80.

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proprietary right to the village in dispute was given by the will of the last male owner to Jagannatha and Sura. The rights of those two had not been given up by them, and the delay in enforcing their rights carried no presumption that they, or either of them, had ever ceded rights to the widows. According [303] to the terms of the will the widows had no right to the village at all. Resting as the title originally did in Jagannatha and Sura, it was not disputed that Sura's son consented to the delivery of the entire village to the former. To this the son consented upon an arrangement that was satisfactory to him and to the parties interested, whereby he was provided for; and Jagannatha obtained the whole village. The terms of the order of the 22nd January 1869, signed by the widows, and directed to the amildar, to deliver possession to Jagannatha, were perfectly consistent with an intention on their part to carry out the will of their late husband; and there was no evidence of any other intention. Limitation had been referred to in the judgment of the High Court, but this could only apply on the supposition that this was a suit brought to enforce the will, which it was not. The plaintiff's case was that the will had been acted on, as a basis for the subsequent arrangement, in pursuance whereof possession followed. The defence consisted of an attempt to establish a supposed agreement, between the plaintiff and the widows, that he should become manager only, on their behalf. Of this last state of things there was no sufficient evidence, and there had been nothing to show that it was supported by any consideration. In connection with the alienation of part of an ancestral zamindari, such as Nidudavolu, and Regulation XXV of 1802, Section 8, *Syed Ali Saib* v. *The Zamindar of Salur* (1) was referred to.

Mr. *J.H.A. Branson* and Mr. *R. Harrington*, for the respondent, argued that the judgment of the High Court had rightly dismissed the suit. So far as it was based upon the will it was barred by limitation, and apart from the will the appellant had made out no title. His possession as manager could be terminated by the widow, and his capacity in that respect was one that he had himself accepted. There was nothing in the order of the 22nd January 1869, showing that the widows intended to act upon the will only, but rather to carry out a new arrangement in which the appellant had acquiesced. The management conferred upon him was in substitution for a claim of title on his part to one half of the village. The evidence had not shown, and no presumption had arisen, that the widows intended to enlarge his interest therein, to the extent of conferring upon him an absolute title to the whole.

[304] The High Court had rightly construed the order of the 22nd January 1869 as revocable. It must have been so, as it contained no words showing that it accompanied the grant of an absolute interest, and as there were no circumstances indicating that there had been such a grant of the whole village. Reference was made to *Bàboo Lekhraj Roy* v. *Kunhya Singh* (2).

Mr. *J.D. Mayne*, was not heard in reply.

Afterwards, on the 8th March, their Lordships' judgment was delivered by Lord MACNAGHTEN.

## JUDGMENT.

This suit was brought to recover possession of the village of Vundrazavaram lying within the zamindari of Nidudavolu, which was formerly

(1) 3 M.H.C.R. 5.

(2) 4 I.A. 223 = 3 C. 210.

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the property of the zamindar Narayya Appa Rau. Narayya died without issue on the 7th of December 1864, leaving a will which dealt with the zamindari and the village separately.

The suit was commenced in February 1888. The original plaintiff was Jagannatha, the appellant's father. He died at an early stage of the proceedings, and the appellant was substituted as plaintiff in his stead. The defendants were Papamma, the surviving widow of Narayya, and an infant also called Narayya Appa Rau, whose late father Ramayya had been adopted by Papamma some time after the completion of the transaction, the effect of which is now in question. The infant Narayya died in the course of the litigation and on his death his interest became vested in the respondent Papamma.

It is common ground that Jagannatha was in possession of the village in dispute from 1869 to 1879 and that during this period his possession was undisturbed. From 1879 to 1883 he was continually in trouble and litigation with the raiyats who withheld their rents and refused to accept pattas at the instigation, it is said, of Narayya's widows or their manager Venkatadri. In 1883 Papamma having survived the younger widow Chinnamma, who was Jagannatha's sister, came forward openly and dispossessed Jagannatha.

The sole question at issue is this.—In what character or in what capacity did Jagannatha hold the village while he was in possession? Was he absolute owner, as the appellant contends, or was he, as the respondent has variously asserted, tenant for life or [305] tenant at will, or grantee upon certain conditions for the breach of which he was liable to be dispossessed, or lastly was he, as the High Court has held, merely manager under a revocable appointment?

By his will, which was dated the 6th of December 1864, the day before his death, Narayya gave his zamindari and all his other property to his two wives—Papamma and Chinnamma. To Jagannatha and Sura, who were brothers of his junior wife, he gave the village of Vundrazavaram in perpetuity. The testator gave three other villages to Sura's son Venkata Krishna. He enjoined his wives to live in harmony with Venkatadri, whom he described as his younger brother, but whose exact relationship to the testator does not appear. And he gave his wives authority to adopt a relative.

The testator's wives signed the will in token of their consent to abide by its terms, and on the 9th of December 1864 they sent a copy of the will to the Collecter and notified their intention of acting in accordance with its provisions.

It appears that neither Jagannatha nor Sura took any steps to obtain possession of Vundrazavaram on the testator's death. There was no opposition on the part of the Ranis, nor was there so far as appears any unwillingness on their part to carry out the testator's wishes. But Jagannatha considered that he had not been fairly treated by the testator who had made a more liberal provision for the family of his younger brother, and so he refrained from accepting the bequest in his favour in the hope that the Ranis would increase it. In the meantime, the village remained part of the zamindari and the rents were received by, or on behalf of, the Ranis and went into their treasury.

In 1869 Sura being then dead and his son Venkata Krishna who had married Venkatadri's daughter having succeeded to his rights, the family differences were composed. It was arranged that the entirety of the village of Vundrazavaram should be made over to Jagannatha as from the

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commencement of the current year with the consent of Venkata Krishna, who was to receive satisfaction for his moiety from the Ranis. The meeting at which the arrangement was completed took place on the 22nd of January 1869. There were present among others Venkatadri Jagannatha, the appellant, and Venkata Krishna and one Prakasa, the Raja of Vutukuru, a near relative, who is now dead. The Ranis were there too, though of course in their own apartments, and communications [306] took place with them from time to time through Prakasa, the appellant and Venkata Krishna. Before Venkata Krishna consented to place his moiety at the disposal of the Ranis for the purpose of the arrangement, he was assured by them that he should either have the moiety bequeathed to him by the testator or receive other villages instead. When he was satisfied Venkatadri dictated to his clerk an order addressed to the amildar directing him to make over the management of the village to the person sent by Jagannatha on behalf of his master. The order was then given to Venkatadri. He handed it to Prakasa and then to Jagannatha. They both read it. Jagannatha read it aloud and expressed his approval. It was then taken to the Ranis. They read it and signed it in the presence of Prakasa, the appellant, and Venkata Krishna, and again repeated their assurances to Venkata Krishna. In conformity with this order, Jagannatha was put into possession of the village. Nothing further is to be found in the record about Venkata Krishna. It must be taken that he received adequate compensation in accordance with the assurances that he had been given him.

That is in substance the whole of the evidence about the transaction which resulted in Jagannatha being put into possession of the village of Vundrazavaram. The only witness at the trial who appeared before the Ranis was the appellant himself. The Subordinate Judge, who observed his demeanour, was satisfied that he was a truthful witness. Neither the respondent nor Venkatadri came forward to contradict him. They were both cited as witnesses for the appellant. But "the former," as the Subordinate Judge states, "threw so many difficulties to her examination "on commission that plaintiff was obliged to abandon her as his witness, "and the latter was reported to be too seriously ill to subject himself to "any examination."

The transaction seems to be a very simple and a very intelligible arrangement, if the position of the parties at the time is considered. Jagannatha was entitled to one moiety of the village and one moiety of the rents from the testator's death. His grievance was that the testator had not given him as much as he thought he was fairly entitled to. With the consent of the person entitled to the other moiety the Ranis made over to him the whole of the village as from the commencement of the current year. In the absence of any evidence it is impossible to suppose that it [307] could have been intended that his interest in the one moiety should be less than or different from his interest in the other. It was not suggested that he should surrender his absolute interest in his own moiety. Sura's moiety was made over to him as an addition to his own. The natural inference and indeed the only reasonable inference that can be drawn from the surrounding circumstances is that he was to hold the entire village in the same way as he was entitled to hold his own moiety, and that his interest in the two moieties should be commensurate. Such a transaction would be perfectly good as a family arrangement. Jagannatha was put in possession of the whole, and as the law then stood no writing was necessary to vest Sura's moiety in him.

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Jagannatha's complaint was that one moiety of the village was not enough for the maintenance of himself and his large family. It is difficult to conceive that he would have surrendered his absolute interest in one moiety for a life interest in the whole which would have left his family unprovided for at his death It is equally inconceivable that he would have accepted any interest less than a life interest. The suggestion that the village was granted to him on condition of personal attendance on the Ranis or on any terms involving a right of resumption is not supported by any evidence.

Of course, if there were anything in the order of the 22nd of January 1869 inconsistent with an absolute interest in Jagannatha, it would be a different matter. It would be impossible for the appellant to rely on possession obtained under a document which would have contradicted his present claim. But the order so far as it goes is consistent with an absolute interest in the person in whose favour it was issued. It directs the amildar to deliver up the management of the village to the messenger of Jagannatha, "so that he may get business managed on his behalf." It states no doubt that the profits over and above the fixed rent required to cover the proportionate part of the Government revenue of the whole zamindari were to be enjoyed by Jagannatha as "vasati," that is, for support or maintenance. But it must be remembered that it was just because he complained that the profits of half the village were not enough for the maintenance of himself and his family that he was put in possession of the whole. There is not a word in the order cutting down Jagannatha's interest to a life [308] interest or to a tenancy at will or imposing any terms as the condition of his continuing to hold the village.

The whole difficulty seems to have arisen from the singular way in which the appellant insisted in presenting his case to the Court. He would have it that his interest was derived solely and directly from the testator and that Jagannatha was put in possession in conformity with the testator's will as indeed the Subordinate Judge held, whereas it is perfectly plain that Jagannatha took Sura's moiety from the Ranis who purchased it from Venkata Krishna by giving him some equivalent. The respondent, on the other hand, insisted that all parties ignored the will and treated the bequest of Vundrazavaram as a nuillity. And so the learned Judges of the High Court have held. They say that "for 24 "years the will has been ignored and the estate has not been given to "the first plaintiff;" that is Jaganntha, "in accordance with its terms. "On the contrary he himself was a party to ignoring it." That seems to their Lordships to be going too far in the other direction. The fact is that the will was plainly the foundation of the whole transaction, though Sura's moiety was derived immediately by gift from the Ranis.

Their Lordships are, therefore, unable to agree with the opinion of the learned Judges of the High Court, who seem to have thought that Jagannatha's title to the possession of the village depended simply and solely upon the terms of the order of January 1869, which they construed as a revocable order committing the management of the village to Jagannatha during the pleasure of the Ranis.

One matter on which the learned Judges of the High Court very much relied as confirming their view ought, perhaps, to be noticed. Some letters were produced which the Subordinate Judge held to have been written by Jagannatha, though there was a dispute about it. They are undated, but they seem to belong to the period when Jagannatha was in

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difficulties with his raiyats. The letter on which most reliance was placed purports to be addressed to his sister Chinnamma. It is abject and servile in tone and incoherent in its language. In it the writer says :—"if you "and Papamma should now write to say 'you should give up that "'village' I will do so without entertaining any contrary intention. . "... the longest I should live would be two or three years more ; it (the "village) will then be added only to your [309] possessions irrespective "of any one else. You must take a little trouble and show an affectionate "regard by thinking 'these persons belong to a high family, and we will "'treat them with so much fairness'; if you do not think in that manner I "only lose my livelihood. I did not wish in the beginning for any right." Then there is a letter to the manager in which the writer says :—"I have "prepared and sent an account of some sort. You will, after perusing "the same, write to me how I shall act in the matter of recovering the "moneys payable by the raiyats. Hitherto I have acted wisely so as to "avoid disputes. As it is not possible to do anything without your per-"mission in Vundrazavaram, I have expressed my opinion in detail and "shall remain at Kadiyam till a reply is received and shall manage in such "manner as you tell me to manage." The learned Judges say that "the "words amount to an unequivocal admission that the writer can only hold "the village for the short remainder of his life and is liable to be called "upon to surrender it at any time at the will of the Rani." The Subordinate Judge thought that such letters written at such a time were not worthy of serious consideration. Their Lordships are disposed to think so too. The letters were apparently written at a time when the Ranis by their manager were covertly interfering with Jagannatha's possession, and he was maintaining his title by legal proceedings against the raiyats. He may well have thought that his sister would not openly declare herself his antagonist or proceed to extremities against him, and that peace might be obtained at any rate in his time by abasing himself before the Ranis and their manager.

Their Lordships are of opinion that the judgment of the High Court must be reversed and that the appeal from the District Judge ought to have been dismissed with cost, and they will humbly advise Her Majesty accordingly.

The respondent will pay the cost of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Burton, Yeates & Hart*.

Solicitors for the respondent: Messrs. *Lawford, Waterhouse & Lawford*.

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## [310] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

KUMARA TIRUMALAI NAIK AND OTHERS (*Plaintiffs*), *Appellants* v. BANGARU TIRUMALAI SAURI NAIK AND OTHERS (*Defendants Nos.* 1 *to* 30 *and* 32 *to* 34), *Respondents.**
[9th February, and 14th, 15th, 16th and 30th March, 1898.]

*Pensions Act—Act* XXIII *of* 1871, *Section* 4 *—Suit relating to inam land granted before the time of the British Government—Confirmation of inam—Construction and enforceability of compromise of suit between members of grantee's family—Removal of manager—Appointment of receiver.*

Early in the eighteenth century two villages were granted by the zamindars of Sivaganga and Guntamanaikanur to the last of the Naik rulers of Madura for the maintenance of the rank and dignity of his family which was now represented by the plaintiffs and defendants Nos. 1 to 23. The property was long managed by the representative, for the time being, of the senior line. In 1844 one of the junior members instituted a suit for partition, which terminated in a decree declaring the corpus of the property to be indivisible and the annual produce to be divisible in certain shares. Subsequently in 1857 a compromise was entered into, by which the parties agreed to vary the distribution of the shares, but they agreed that the management of the estate, indivisible and inalienable, should continue to be vested in the eldest line subject to certain supervision on the part of the other members. The compromise was long acted upon by the family; but in 1892 the representative of the senior line died, leaving only his widow and infant sons. The widow, as guardian of the elder son, then entered on the management, and, being gosha, delegated it to a stranger. The plaintiffs representing a junior line now sued for the removal of these persons from management and the appointment of another manager, alleging both that they had no right to the managership and that they had been guilty of mismanagement. All the members of the family were made parties to the suit. It appeared that the plaintiffs had not received their proper share of the produce and the defendants in management denied in the pleadings their right thereto. The plaintiffs had not obtained a certificate from the Collector under the Pensions Act XXIII of 1871, and it appeared that the grant of the villages had been confirmed as an inam by the British Government:

*Held*, (1) that the suit did not fall within the provisions of Pensions Act, Section 4, and a certificate of the Collector was accordingly unnecessary.

(2) that the compromise was binding on the parties, and that under the compromise the plaintiffs had no right to joint management; and

(3) that the widow of the last manager should be removed from the managership, and that until one of her sons came of age the estate should be managed by a receiver appointed from among the members of the family.

[R., 29 B. 490=7 Bom.L.R. 497; 15 Ind. Cas. 871 (874)=23 M.L.J. 687 (692)=12 M.L.T. 541=(1913) M.W.N. 255 (260).]

[311] APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East), in original suit No. 11 of 1896.

This suit was brought by plaintiff No. 1 and two of his sons against thirty-two persons, of whom defendants Nos. 1 to 23 were together with the plaintiffs, the descendants of Raja Bangaru Tirumalai Naikar. Defendant No. 24 was the mother and guardian of defendants Nos. 1 and 2 and the nominal manager of the two villages to which the suit related. Defendant No. 25 was her agent and the remaining defendants were persons who had obtained from him on favourable terms leases of part of the lands. The plaintiffs' case was that they and defendants Nos. 1 to 23 were all interested in various decrees in the two villages, that the

* Appeal No. 54 of 1897.

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twenty-fourth and twenty-fifth defendants had no rights of management and had been guilty of acts of mismanagement by granting the leases above referred to and refusing to render accounts and otherwise. The prayers of the plaint were as follows:—

"That defendants Nos. 1 and 24 be declared incapable of managing "the affairs of the two villages hereunder mentioned in Schedule A, and "they and twenty-fifth defendant be removed from the said management.

"That the Court be pleased to appoint first plaintiff or other persons "among the family whom the Court may think fit for the management of "the plaint properties with all the powers incidental to the management, "such as grant of patta to the raiyats, distribution of the income among "pangalies, &c.

"That it be declared that the power of agency granted by twenty-"fourth defendant to twenty-fifth defendant is invalid and not binding on "plaintiffs.

"That twenty-fourth and twenty-fifth defendants be decreed to give "plaintiffs personally, and from the estate of first defendant, Rs. 421-6-9 "on account of plaintiffs' share of produce, which they could, on proper "managements, have got for Fasli 1304 as per Schedule C, and also "produce of subsequent Faslis.

"That the Court be pleased to declare that cowles in favour of defend-"ants Nos. 26 to 32 by defendants Nos. 1 and 24 specified in Schedule B "are not binding on plaintiff and other members of the family, and to "decree possession of the lands on behalf of the family to whomever the "Court may appoint as manager."

**[312]** It appeared that the villages had been granted to the family of Raja Bangaru Tirumalai Naikar after his capture by the Nawab of the Carnatic early in the eighteenth century, and that the grants, as to the terms of which there was no evidence, had been made by the Rajas of Sivaganga and Guntamanaikanur to provide for the maintenance of the rank and dignity of the family. Up to about 1822 the head of the family enjoyed the property and maintained the younger members of it. Subsequently disputes arose, which were for a time set at rest by a decision of the Collector to the effect that the property was impartible and descended in the eldest male line; but in 1844 a suit for partition was brought by the father of the present first plaintiff who represented a junior branch of the family, and this suit was terminated by a compromise on the basis of which the present relief was asked for. The suit was carried on appeal to the Court of Sadr Adalat, which decided that the property itself was indivisible, but that the annual produce should be enjoyed by the respective claimants in such portion as they might be found legally entitled to, and directed an inquiry by the Court of First Instance as to the parties by whom and the shares in which the joint participation of the annual produce of the estate is to be enjoyed (see *Viswanadha Naik* v. *Bungaroo Teroomala Naik* (1)). On the 8th December 1852, the Civil Judge made a decree declaring "that the income of the estate "having been ordered to be distributed shall and must as heretofore be "collected by and paid to Raja Vijaya Kumara Visvanadha Bangaru "Tirumalai Sauri Ayyar, son and heir of Bangaru Tirumalai Naik, the "first defendant in this suit, deceased, and to his heirs according to the "rules and law of primogeniture for ever, or during the subsistence of the

(1) Sadr Adalat Decisions (1851) 87.

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"grant, to be by him and them appropriated and distributed as follows, "*viz.* :—

"*First*: To the liquidation, by instalments, or in such manner as "the members of the family may judge best, of the outstanding debts "which may have been contracted by the head of the family for the joint "benefit, during the subsistence of the ancient custom and arrangement "now and hereby subverted.

"*Second*: To the payment of such annual charges and expenses on "account of charitable and religious purposes as have from ancient times, "and by common consent, been incurred and paid [313] on account "of the family collectively and which cannot now be discontinued without "impiety, and disgrace in public opinion, and so frustrating the object of "the grant, *viz.*, the maintenance of the dignity and rank of the family.

"*Third*: To the payment, the above being deducted, of one-half of the "remaining net income to the descendants of Rangappa Naik, the second "son of Raja Bangaru, who are at present. . . . . . . . . . .

"If the said five individuals choose to subdivide and draw their "respective shares separately, then to each of them one-fifth of the said "moiety.

"*Fourth*: To the payment and division of the remaining half should "they desire it, among the descendants of Vijaya Kumara Muttu Tiru-"malai Naikar, the eldest son of Raja Bangaru.

"*Fifth*: This award will not, of course, prevent the elder branch of the "family from remaining united and enjoying their portions in common if "they please. It only declares that those who may desire separate "allowances are entitled to demand them to the extent also of one-fifth of "their moiety of the income five shares existing in this branch likewise."

On the 23rd March 1857 the parties entered into a compromise, which was marked as Exhibit C in the case, and was in the following terms:—

"That, although the decree in this suit provides that the shareholders "should divide among themselves into ten shares, the net income after "deducting the common expenses mentioned in the said decree from the "income of the villages of Vellikurichi and Thekkampatti, less service, &c., "maniams and Beereathayam and Brahmathayam, the tirwa income "for faslis 1263 and 1264, as per accounts submitted to the Court "by the first defendant's heir and by the Amin appointed by the "Court for the said faslis, after deducting therefrom the service, &c., "Inams, and Devathayam, and Brahmathayam should be divided into "twelve and-a-half shares as follows:—One and-a-half shares for the "common expenses provided for by the decree, one share to the first "defendant's heir according to his share, the first defendant's heir's "share on the whole therefore amounting to two and-a-half shares, "three shares to the three pauper plaintiffs, one share to the second "defendant, one share to the third defendant, one share to the fourth "defendant, one share to the deceased fifth defendant, one share to "the sixth and seventh defendants, one share to the eighth defend-"ant, and one share to the ninth defendant, and the twelfth defend-"ant's heir should cause the shares of the other shareholders to be given to "them as provided above, and take receipts from them in support thereof; "that, in pursuance of the meaning conveyed by the decree, the first de-"fendant's heir should, as the managing member of the family have for the "Thekkampatti village only such of the holders of service inams as are em-"ployed there now, such as Kanakkan (Karnam), Nattanmai (Moniagar), "and Samprathu (clerk), but [314] should not increase the establishment by

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"appointing more hands; that he should, out of the common money, get a "manager and clerk appointed for the village of Vellikurichi on a salary of 20 "kalams of paddy per annum each; that he should take upon himself and "manage the several business of the said two villages; that the power of ap- "pointing and dismissing the said manager and clerk, etc., should be with the "first defendant's heir; that although the business of threshing the crops, "collecting the produce, and dividing the melvaram, &c., and that of the "collection of Swarnathayam, &c., taxes rest with the twelfth defendant's "heir alone, and he himself should get them done, yet if the share-holders, "inclusive of the pauper plaintiffs, or any of them, should desire to be "with him and have an eye upon the business, he should admit them or "him without any obstruction or delay; that he should get, by the clerk "of each village, a copy of the accounts kept for the cultivation, threshing, "of crops, division of varam, amount of tax to be collected, and amount of "tax collected, &c., furnished to that particular shareholder, who may be "appointed by the others for that purpose; that, if the other share- "holders, inclusive of the pauper plaintiffs, or any of them, should desire "that their respective share in the paddy, &c., grain due for the melvaram "and the occupancy right of the people in the village of Thekkampatti "and for melvaram in the village of Vellikurichi be paid in the threshing- "floor itself according to the above shares, the first defendant's heir should "accordingly divide the grain and give to such shareholders their share; "that, if the first defendant's heir should fail to get things done as afore- "said or if there should be any room to think that he is deceiving others "by not keeping correct accounts for the income of the villages, or if "there should be any room to think that he, without properly dividing "and giving to the plaintiffs their shares, wants to deceive or is deceiving "or has deceived them, the plaintiffs should have their shares put in "their possession by means of precepts of writ that both parties are res- "ponsible for their respective debts and should themselves discharge "them from their respective shares; that, if any repairs should be neces- "sary for the said villages, the first defendant's heir should get them done "from the common fund, according to the consent of all the shareholders "or according to the intention of the majority of them; that, if any "litigation or other dispute should arise in respect of the said villages, "the first defendant's heir should meet the necessary expenses thereof "in the manner above described; that, he has no right to hypothecate "or mortgage to any one, as he liked, the several kinds of right posses- "sed by the said families in the said villages, on the ground that he is "the managing member of the family and looks after all business; that, if, "on the other hand, he should hypothecate or mortgage, it shall not be "valid; that, further, he has no right to give in darkhast or otherwise to "any one as he liked and without the consent of the other shareholders "the several kinds of income derived from the said villages for the benefit "of the said families, that is, all the shareholders; that, similarly, the "other shareholders also should not sell or mortgage their respective "shares; that, if, on the other hand, the first defendant's heir or the "other shareholders should do as aforesaid, it shall not be valid; that, "if the other shareholders or any of them should, owing to any inconve- "nience to be present at the time of profit and to receive the income "due to their shares or his share, transfer or otherwise give to any one "the share of one year, the first defendant's heir can have the shares "or share of the transferring shareholders or shareholder given to "**[315]** the transferees or the transferee; that the first defendant's heir

"should get a voucher from the shareholders who may have so transferred their shares; that, if, without such a voucher, the first defendant's heir should say that he has, according to the transfer, given to any one (the transferee) the share of any shareholder, it shall not be valid; that if, besides the two and a half pangus, determined to be given the first defendant's heir inclusive of the share for the common expenses mentioned in the decree, he should put forth other expenses such as expenses for charity and money paid for debts, it shall not be valid; that out of the one pangu now determined to be given to the deceased fifth defendant, quarter pangu is to be divided and taken by his brother the fourth defendant, and the remaining three-fourths pangu by the seventh defendant, who, out of the sixth or seventh defendants, the sons of the elder brother of the fifth defendant, alleges himself to be the Abimanaputra of the said fifth defendant; that this three-fourths share together with the one share determined to be given to the sixth and seventh defendants amounting to one and three-fourths shares in all should be divided equally between the sixth and seventh defendants, who are brothers, and taken in halves; that the fourth defendant should discharge the debts due by the said fifth defendant to the extent of one-fourth and the sixth and seventh defendants, to the extent of three-fourths, that out of Rs. 30, the amount of maintenance determined by all the shareholders to be paid annually to Pallisami Ammal, the widow of the said fifth defendant till her death, the fourth defendant should pay 7-8-0; the sixth defendant Rs. 11-4-0 and the seventh defendant Rs. 11-4-0; that as the several kinds of income for faslis 64 and 65, by way of produce, have been given up in favour of the first defendant's heir, without any connection in them to the pauper plaintiffs and the other shareholders, all the shareholders are to act up to the terms of this razinamah from the current fasli 66; that if the first defendant who is not present should raise any objection to the terms of this (razinamah) Vijaya Kumara Muttu Tirumalai Naikar *alias* Dorasami Naikar Avergal, son of the eighth defendant, should be answerable for it and that the first defendant's heir himself should obtain back Rs. 659-0-9 deposited by him in Court for the plaintiffs for fasli 64, and as all the shareholders, the eighth defendant's son taking the part of the first defendant, who is not present, having come to a settlement consenting to the above terms, we pray that the Court will be pleased to accept this razinamah and stay all proceedings taken by the Court on account of faslis 64, 65 and 66."

The father of defendants Nos. 1 and 2 representing the eldest line managed the estate until his death in 1892, when his widow defendant No. 24 entered on to management. It was pleaded by defendant No. 1, *inter alia*, as follows:—

"The suit in question is barred by the execution of the decree of original suit No. 1 of 1844 alleged in the plaint, to have been obtained by first plaintiff's father as plaintiff in it.

"The relief claimed by plaintiffs to enforce the terms of the razinamah, dated 23rd March 1857, mentioned in the plaint in a separate suit after a lapse of 39 years cannot be granted under law as he failed to obtain the same in execution proceedings in the said original suit No. 1 of 1844.

**[316]** "This suit, brought without obtaining the sanction of Government under the Pensions Act and without adding the Collector as a party, is not maintainable.

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"The defendants do not admit the razinamah mentioned in paragraph 4 of the plaint. It is a fraudulent one. It cannot bind these "defendants. As the decree in the said suit No. 1 of 1844 has not been "passed in accordance with the said razinamah, it (the said razinamah) "was not acted upon and therefore became useless."

The most important issues framed in the suit were as follows:—

"2. Whether the suit is barred by reason of the decree in original "suit No. 1 of 1844 or by reason of the present non-enforceability of that "decree as alleged by first defendant?

"3. Whether a suit will now lie to enforce the razinamah of the "23rd March 1857 referred to in the plaint?

"4. Is the Collector a necessary party to this suit? and should the "suit fail for his non-joinder as alleged by first defendant?

"5. Whether the suit should fail for want of sanction under the "Pensions Act?

"6. Are the plaintiffs entitled to any and what share in the plaint "property? and, even if entitled, is the suit barred by limitation by their "non-enjoyment of any share of the produce within the last twelve years?

"7. Is the first defendant the absolute owner or only manager of "the plaint estate?

10. Are the cowles for the lands in B schedule binding on the "estate?

"11. Whether plaintiffs are entitled to any and what mesne "profits?

"12. Are there sufficient grounds to remove defendants Nos. 24 "and 25 from management and to appoint somebody else for management "if first defendant is entitled to the management of the property?"

As to the second issue the Subordinate Judge answered the question in the negative. As to the third issue he pointed to evidence showing that the compromise had frequently been acted upon, and said :—"The "plaintiffs do not now sue to enforce the terms of the razinamah. They "say that those terms have always been acted upon and their shares "of produce given them till [317] 1892, and they merely rely upon "it as a piece of evidence in support of their right in modification of "the final decree in original suit No. 1 of 1844." With regard to both of these issues he referred to *Darbha Venkata Sastri* v *Vurella Gangaia* (1), *Calapatapu Kristnayya* v. *Rajah Lakshmi Venkamma Row* (2), *Sabhanatha* v. *Lakshmi* (3), *Ram Dial* v. *Inder Kuar* (4), *Ashutosh Bannerjee* v. *Lukhimoni Debya* (5), and *Vishnu Shambhog* v. *Manjamma* (6). As to the fourth and fifth issues he decided them in the negative, and his decision as to the seventh and the first part of the sixth issue was :—"that "the plaintiffs are entitled to no share in the plaint property but only to "one out of twelve and a half shares out of their income." He held "the "first defendant to be the inam-holder of both villages burdened only with "the obligation to give the specified shares to the other pangalis as settled "by the razinamah (Exhibit C)." As to the cowles referred to in the tenth issue he held them to be good and valid. On the twelfth issue he said he saw no reason to remove defendants Nos. 24 and 25 from management or to appoint any one else. In the result (see the eleventh issue) he passed a decree for Rs. 184 being the share of the produce to which he found them to be entitled in arrears.

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(1) 2 M.H.C.R. 305. (2) 5 M.H.C.R. 93. (3) 7 M. 80.
(4) 16 A. 179. (5) 19 C. 139. (6) 9 B. 108.

The plaintiffs preferred this appeal against his decree to which objection was taken by defendant No. 24 and her two sons. **1898 MARCH 30.**

The Acting Advocate General (Hon. *V. Bhashyam Ayyangar*), *V. Krishnasami Ayyar* and *Venkatasubbaramayya*, for appellants. **APPELLATE CIVIL.**

*Sankaran Nayar* and *Rangachariar*, for respondents.

**21 M. 316.**

JUDGMENT.

The following are the undisputed facts of the case. About the beginning of the last century, the zemindars of Sivaganga and Guntamanaikanur made a free grant of the two villages of Velikurichi and Thekkampatti, respectively, to Raja Bangaru Tirumalai Naikar, the last of the Naik rulers of Madura, for the maintenance of the rank and dignity of his family. The plaintiffs and the defendants Nos. 1 to 23 are his descendants. In 1844 a suit was brought by the present first plaintiff's father for a partition of these villages between the members of the family, but it was held by the Court of Sadr Adalat, after consultation with its pandits in Hindu law, that the *corpus* of the property was **[318]** indivisible, but its annual produce was divisible, and they directed the Civil Court to determine the parties by whom and in what shares the joint participation of the annual profits of the estate was to be enjoyed. The Civil Judge thereupon, in September 1852, passed a decree, defining the shares of the produce to which the several members of the family were legally entitled. In the course of the execution of that decree, the parties entered into a razinamah (Exhibit C of the year 1857), whereby they agreed slightly to vary the distribution of the shares ordered by the decree as they had to include another member of the family who had been omitted from the decree to take a share. They further agreed that the estate should be held indivisible and inalienable in consonance with the decree, and they also agreed that the management of the estate should continue to be vested in the eldest line subject to certain supervision on the part of the other members. The father of defendants Nos. 1 and 2 represented the eldest line and managed the estate until his death in June 1892. The first and second defendants now represent the eldest line on whom the sole right of management has devolved; but they are minors, and their mother, the twenty-fourth defendant, is managing the estate on their account with the help of an agent, defendant No. 25, appointed by her. The plaintiffs bring this suit to remove defendant No. 24 from the management and with her, her agent, the twenty-fifth defendant, on the ground that she is not entitled to manage the estate and has, moreover, been guilty of mismanagement thereof, in that she has not only not given them their share of the produce, but has also denied their right thereto, and that she has been improperly granting cowles for valuable pieces of land in favour of defendants Nos. 26 to 34. They pray that, on the removal of the twenty-fourth defendant from the management, either the first plaintiff or another fit member of the family may be appointed to the management and that the cowles granted by the twenty-fourth defendant to defendants Nos. 26 to 34 may be cancelled. The plaintiffs also pray for the recovery of their share of the produce for fasli 1304 which has been withheld from them. Defendants Nos. 3 to 23, all the other members of the family, but defendants Nos. 1 and 2, support the plaintiffs' claim. The twenty-fourth defendant contests it on behalf of defendants Nos. 1 and 2, her sons, and defendants Nos. 26 to 34 also contest it so far as the cowles which they hold are concerned, which they allege were validly granted to them by the **[319]** twenty-fourth defendant. The twenty-fourth

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defendant contends that she has the right of management as the natural guardian of her sons in whom the sole right to manage lies and that there has been no mismanagement on her part. She also takes objection to the suit on two grounds—(1) that it does not lie upon the razinamah (Exhibit C) and (2) that it could not be brought without a certificate from the Collector under the Pensions Act XXIII of 1871. The Subordinate Judge has found that there was no objection to the suit on the two grounds just stated, but that there was no ground for the removal of the twenty-fourth defendant from the management which she was entitled to hold on behalf of her sons, defendants Nos. 1 and 2, and that the other members of the family had no right to the management. He also held that the cowles granted to the defendants Nos. 26 to 34 were good and valid and simply gave the plaintiffs a decree for what he found to be the produce due to them for fasli 1304.

The plaintiffs appeal against the decision of the Subordinate Judge refusing to remove the twenty-fourth defendant from the management and to cancel the cowles, while the first, second and twenty-fourth defendants, by way of a memorandum of objections, still maintain that the suit is not maintainable on the razinamah and that the Pensions Act applies to it. It will be more convenient to dispose of these two objections first. On the first point we find that the razinamah (Exhibit C) is binding upon the parties. It was an agreement or contract entered into by them for a settlement of disputes which arose subsequent to the decree which it did not vary in any material matter. It has been frequently acted on without either party impugning its validity, and its terms being merely declaratory of the rights of the parties can be enforced only by a separate suit. We, therefore, overrule the first objection to the suit.

As to the second objection taken under Section 4 of the Pensions Act XXIII of 1871, namely, "no Civil Court shall entertain any suit "relating to any pension or grant of money or land revenue conferred or "made by the British or any former Government" without a Collector's certificate, it is evident from the history of the case as contained in the extract from the inam register upon which the inam title-deeds were issued and from the statements in the pleadings of both plaintiffs and defendants, that the grant was not "conferred or made" by the British **[320]** Government or any former Government, for it was made by the zemindars of Sivaganga and Guntamanaikanur. It was then contended that, although the original grant may not have been by any Government, yet the British Government by recognizing and confirming the inam granted by the zemindars has itself made a grant of the land revenue. Assuming, however, that the act of this Government in confirming the inam amounted to a re-grant of it, it cannot be said that the giving of land free of revenue is a grant of land-revenue so as to bring the case within the provisions of the Pensions Act. "Freedom from liability "to land revenue is not identical with holding a grant of land revenue, "any more than the extinction of an easement by becoming sole proprietor "of the property, servient as well as dominant, is a grant of an easement. "The land revenue arising from a man's own holding, when it is remitted, "and the land pays nothing, is rather extinguished than granted." (See *Babaji Hari* v. *Rajaram Ballal* (1)). But, as a matter of fact, this Government had no power to tax this inam and therefore made no grant of it.

(1) 1 B. 75 (81),

Although by Section 4 of Regulation XXV of 1802, the right of this Government was reserved to continue or abolish the exemption from revenue of lakhiraj lands such as this, yet by Regulation XXXI of 1802 passed the same day as Regulation XXV that power was taken away in respect to this particular inam, that is assuming that it was situated in the district of Dindigul, inasmuch as it had been granted previously to the 18th day of March 1792. By Section 2 of this Regulation, the grant was declared valid subject only to its registration under Section 15. Further, supposing that it was not in the district of Dindigul, or that such registration had not been effected so as to give the inamdars a complete title as against Government, it is clear that when in 1859 or 1860 the Government made their rules for the adjudication and settlement of the inam lands in this presidency, they declared, under Rule 1, that all inams which had been held uninterruptedly for a period of fifty years should be treated as possessed under a valid title whatever may have been their origin. This admittedly is such an inam, and it was confirmed to the grantee under Rule 5 of the Inam Rules. The Government having retained to themselves no power to resume it, cannot be held to have made any [321] fresh grant of it. On all these grounds, therefore, we are of opinion that this case does not fall within the provisions of Section 4 of the Pensions Act. The memorandum of objections must, therefore, be dismissed with costs.

Coming now to the appeal, we agree with the Subordinate Judge that the grant of the cowles to defendant Nos. 26 to 34 by the twenty-fourth defendant was not an act of mismanagement. We consider that it was within the competence of the manager of the estate to grant such cowles. Similar grants had been made by the first and second defendants' father without objection on the part of the other members of the family, and we find nothing in the terms of the razinamah (Exhibit C) prohibiting such grants by the manager as was urged for the plaintiff. There is nothing to show that the rents secured by the cowles are not fair and advantageous to the estate, and we do not believe the plaintiffs' story that they were corruptly obtained by the payment of nuzzers. We therefore dismiss the appeal so far as it concerns defendants Nos. 26 to 34 with costs.

The most material question in the suit which is now left for our decision is, whether the twenty-fourth defendant should not be removed from the management, and if she is removed therefrom how the management is to be carried on during the incapacity of defendants Nos. 1 and 2 by minority or otherwise. The settlement of this question depends very much upon the settlement of the question of what interest in the estate the members of the family other than defendants Nos. 1 and 2 possess. The Subordinate Judge has found that the first and second defendants are the absolute owners, and that the other members have only a right to maintenance according to the shares agreed upon. But we cannot concur in this view. The right, which the other members of the family undoubtedly have to specific defined shares out of the net income of the estate, is certainly greater than the right to mere maintenance. An absolute right to take the rents of land ordinarily involves a right to the land itself (see *Mannox* v. *Greener* (1), and Section 159 of the Indian Succession Act, where the same principle is laid down). But, where there is a clear intention that only the profits of the land are to be taken and not the *corpus*, the general rule would not apply. Now, here we have [322] both in

(1) L.R. 14 Eq. 456.

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the decree in the suit of 1844 and in the razinamah (Exhibit C) a clear prohibition against the division of the *corpus* which is declared to be impartible. But for this prohibition, the members of this family would be entitled by virtue of the division of the shares of the produce to a division of the lands, and it is only the decree, which we cannot question, that prevents such division. But that the members of the family have a common right in the property is declared in the answers by the pandits. In their first answer, they say that the estate having been granted for the maintenance of this family belongs to all its descendants, and in their second answer they refer to the property as common to all the members of the family. Their opinion so clearly expressed is no doubt in accordance with the law. So that we must view the plaintiffs and defendants Nos. 3 to 23 as co-owners of the property with defendants Nos. 1 and 2. That being so, they would have an equal right to management with defendants Nos. 1 and 2, had it not been for their own agreement in the razinamah that the sole right of management should remain in the eldest branch of the family represented by defendants Nos. 1 and 2. That precludes them from claiming such a right now. It is urged on their behalf that the razinamah (Exhibit C) itself contemplates a right to joint management. But we are altogether unable to read it in that light. It seems to us clear that the only right reserved to the other members of the family after placing the sole right of management in the senior branch of the family is that of supervision only. Although they have thus bartered away their right to joint management, they yet have a right to see that their interest in the joint property is protected, and they very naturally complain that the affairs of their estate are now being actually managed by a complete stranger, the twenty-fifth defendant, the agent of the twenty-fourth defendant. The twenty-fourth defendant is clearly not a proper person to be entrusted with the management of the whole estate for she is a gosha lady and is in consequence, compelled to employ an agent to do work for her. Moreover, he or she or both together have not only omitted to distribute to the plaintiffs their proper share of the produce of the land, but have gone further and denied their right to it in this suit. These circumstances are quite sufficient to disentitle her to hold the management any longer. As the natural guardian of the first and second defendants she [323] may be entitled to look after their interest, but their interest is as we have shown, only a small portion of the whole interests involved. We shall, therefore, direct her removal from the managership and with her, of course, the twenty-fifth defendant, her agent. It remains to determine who is to look after the estate, while the first and second defendants, who are entitled by right to do so, are incapacitated by reason of their non-age. The razinamah contains no provision for a case like this, where the person entitled to manage is incompetent, and we have found that the other members of the family are not entitled as of right to take up the management. In the absence then of a competent hereditary manager, we think the proper course will be to direct the appointment of a receiver for the proper preservation of the property until the first or second defendant is competent to undertake the duties of hereditary manager. We shall, therefore, direct that one of the parties interested in the property, either the first plaintiff or such a one of the defendants Nos. 3 to 23 as is a major and otherwise eligible, be appointed as receiver of the estate without remuneration, until the first or second defendant attains majority, or until further orders. It will be left to the Subordinate Judge to select the

individual and he will take security from him to the amount of one year's income. We accordingly add to the decree of the Subordinate Judge a direction for the removal of the defendants Nos. 24 and 25 from the management of the estate and for the appointment in their place of a receiver on the terms above stated, and we shall modify the Lower Court's decree as to costs by directing that the costs of defendants Nos. 1, 2, 24 and 25, namely, Rs. 298-14-6, be borne by themselves, instead of being borne by the plaintiffs. In this Court also the plaintiffs, who have not succeeded on the case they set up, and defendants Nos. 1, 2, 24 and 25 will bear their own costs and so will defendants Nos. 3 to 23. As already ordered, the plaintiffs will pay the costs of defendants Nos 26 to 34, and will get costs from defendants Nos. 1, 2 and 24 on the memorandum of objections.

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21 M. 324=8 M.L.J. 58.

## [324] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

SANKARALINGA MUDALI (*Petitioner-Defendant No.* 2), *Appellant v.* RATNASABHAPATI MUDALI AND OTHERS (*Counter-Petitioner-Plaintiff and his Representatives*), *Respondents.** [16th December, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Sections* 80, 101, 108—Ex-parte *decree—Substituted service of summons.*

A decree was passed *ex parte* against defendants on whom the summons was served by affixing it to their house. The defendants who had applied unsuccessfully under Civil Procedure Code, Section 101, to be heard in answer to the suit, now preferred a petition under Section 108 that the decree be set aside. This application was dismissed. On an appeal by one of the defendants:

*Held*, as it appeared from the serving officer's return that, according to the information given to him, there was no prospect of his being able to serve the defendant personally within a reasonable time, that he was justified in affixing the summons to the door of the house.

*Per cur* :—The fact that an order under Section 101 has been made against a defendant and has not been appealed against is no objection to an application being made by him under Section 108.

[F., 21 M L.J. 978= 10 M.L.T. 566 (567)=(1911) 2 M.W.N. 357 ; R., 23 M. 494 (496); 34 M. 228 (230)=6 Ind. Cas. 239=20 M.L.J. 805=8 M.L.T. 72= (1910) M.W. N. 226 ; 2 N.L.R. 63 ; 13 Ind. Cas. 127 (128); D., 29 M. 324.]

APPEAL against the order of E. J. Sewell, District Judge of North Arcot, in original suit No. 42 of 1892 on miscellaneous petition No. 120 of 1895.

The petitioners were the defendants against whom a decree was passed *ex parte* on the 30th March 1895. On this application they alleged they had not been duly served the summons, and were not informed of the suit until after the settlement of the issues and the petition proceeded as follows :—" Subsequently these defendants have put in petitions with affidavits under Section 101 of the Code of Civil Procedure " to set aside the *ex-parte* order and accept their written statements filed " by them in Court and proceed with the suit on merits. Their applications were then rejected. Now as a decree is passed *ex parte* against

* Appeal against Order No. 6 of 1897.

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"these defendants, they most humbly pray that it may be set aside, and "the suit proceeded with for a decision upon merits." The application was dismissed [325] by the District Judge who was not satisfied under Civil Procedure Code, Section 108, that the summons was not duly served, or that the applicants were prevented by any sufficient cause from appearing when the suit is called on for hearing. As to the service of the summons he said:—"The summons to the defendants were affixed to "first defendant's house on the 25th February, and the District Munsif "who had the summons served after such enquiry as he thought fit "declared the summons duly served under Section 82 of the Civil Procedure Code. That his decision was right inasmuch as the house is "first defendant's residence appears from the fact admitted by first "defendant in his affidavit that he returned on the 20th March to this "house from Bangalore . . . . The second defendant is first defend-"ant's brother . . . . The return on the summons which is "certified by the Village Munsif states that second defendant lived in "the first defendant's house and had only left it three days before the "notice was affixed."

Defendant No. 2 preferred this appeal.

Mr. *J. Satya Nadar* and *V. Krishnasami Ayyar*, for appellants.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*) and *Gopalasami Ayyangar*, for respondents.

## JUDGMENT.

The Advocate-General raises a preliminary objection to the effect that inasmuch as an order was passed against the second defendant (appellant) under Section 101, Civil Procedure Code, and as no appeal was made against the *ex-parte* decree so as to enable the appellant to impeach that order, the appellant was not entitled to make an application under Section 108 raising the same question as had been already decided against him under Section 101, nor should he be now allowed to appeal against the order made against him under Section 108.

This contention at first sight may seem to be reasonable, but having regard to the very wide words " in any case " used in Section 108 we are unable to hold that the defendant was not entitled to make an application under Section 108. That being so he was, under Section 588, entitled to prefer the present appeal.

Nor can we agree with the Advocate-General's contention that even if an appeal lies and the *ex-parte* decree is set aside, the proceedings will be futile inasmuch as the order passed under Section 101 could not be interfered with in an appeal like the present. We think, if under Section 108 an *ex-parte* decree is set aside this necessarily carries with it a reversal of any order previously made [326] under Section 101 refusing to allow the party to appear and defend the suit. To hold otherwise would lead to an absurdity.

Turning now to the merits the question whether the serving officer "cannot find" the defendant within the meaning of Section 80 is one which must be determined with reference to the circumstances of each case. If the information given to the serving officer leads him to think that the defendant is only to be absent for a short time, it may well be that the serving officer should, if possible, wait and endeavour to effect personal service (*Bhomshetti* v. *Umabai* (1)). Otherwise, and if there is

(1) 21 B. 223.

no person who can be served in the absence of the defendant, we see nothing improper in the serving officer affixing the summons to the outer door of the defendants' ordinary residence. In the present case the serving officer's return shows that according to the information given to him there was no prospect of his being able to serve the appellant personally within a reasonable time. He was, therefore, justified in affixing the summons to the door of the house, and the District Judge was justified in accepting it as a sufficient service.

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We must, therefore, dismiss the appeal with costs.

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**21 M. 326 (F.B.).**

## APPELLATE CIVIL—FULL BENCH.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Shephard, Mr. Justice Subramania Ayyar, Mr. Justice Benson and Mr. Justice Davies.*

RAMACHANDRA RAYAGURU (*Plaintiff*), *Appellant v.* MODHU PADHI (*Defendant*), *Respondent.** [4th and 15th March and 13th September, 1897 and 1st April, 4th May and 15th July, 1898.]

*Limitation Act—Act XV of* 1877, *Schedule II, Articles* 132, 147 *—Mortgage—Suit for sale.*

On 2nd July 1879 the defendant mortgaged to the plaintiff certain property to secure payment of a debt with interest. The instrument purported to be a mortgage with possession, and it contained a covenant to repay the mortgage amount on the 8th March 1882. The plaintiff never obtained possession and he brought a suit on the 29th June 1894 to recover the principal and interest by the sale of the land:

[327] *Held*, that the suit was governed by Article 132 and not Article 147 of Limitation Act, Schedule II, and was accordingly barred by limitation.

[Diss., 25 M. 220 (243) (F.B.); F., 8 M.L.J. 217; R., 30 M. 426=4 A.L.J. 625=9 Bom. L.R. 1104=6 C.L.J. 255=11 C.W.N. 1005=34 I.A. 186=2 M.L.T. 33; 35 M. 191 (195) (P. C.)=9 A.L.J. 504=14 Bom. L.R. 455=15 C.L.J.466=16 C.W.N. 489=23 M.L.J. 16=11 M.L.T. 313=(1912) M.W.N. 433; 16 Ind. Cas. 236 (237).]

SECOND appeal against the decree of J. P. Fiddian, District Judge of Ganjam, in appeal suit No. 194 of 1894, affirming the decree of O. S. R. Krishnamma, District Munsif of Berhampur, in original suit No. 203 of 1894.

The plaintiff sued to recover principal and interest due upon a mortgage deed executed by the defendant in his favour. This instrument (therein described as a deed of mortgage with possession) bore date the 2nd July 1879, and omitting the names of parties and the boundaries it was as follows:—

"This twenty-five bharanams inam land situated within the said "limits, I have mortgaged to you with possession and received from you "thereon in cash this day Rs. 76. As to the said principal and interest "thereon at Rs. 1-10-0 per cent. per mensem you should take on account "thereof every year on the Dola full-moon day the rajabhagam produce "accruing from the said lands and be granting the receipts for the same. "Thus in three years, that is, on the Dola full-moon day of the 28th year "of reign, we shall settle the account, pay up the amount that may re-"main due and take our land and this document. If in this regard any

* Second Appeal No. 1699 of 1895.

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"hindrances arise whether from act of State or by my heirs, we alone "shall be responsible therefor, and you shall not be concerned therewith. "This deed of mortgage with possession of land is executed of my own "consent."

The plaintiff filed the present suit on the 29th of June 1894 to recover principal and interest by sale of the mortgage premises, averring that possession was never delivered to him, nor anything paid on account of the debt or interest. The District Munsif dismissed the suit as barred by limitation, and his decree was affirmed on appeal by the District Judge who said :—

"I agree with the Lower Court that the time fixed in the bond for "repayment of the balance found due and for surrender by the mortgagee "is 8th March 1882 and, therefore, if Article 132 applies, the suit is "admittedly out of time, as it was filed in June. Plaintiff (the only witness "examined) deposed that he never got possession, and therefore if he "wished to enforce the mortgage, he should have sued for specific perform- "ance for which he had three years from the date on which, according to "the bond, he was to get possession. In this view, the suit as on a mort- "gage with [328] possession was barred before the end of 1882. In any "case, however, the contract for usufructuary mortgage not having taken "effect, plaintiff cannot have more than twelve years from the due date, "and as this is found to be 8th March 1882, the suit brought in June 1894 "was time-barred."

The plaintiff preferred this second appeal.

*Rangachariar*, for appellant.

The respondent was not represented.

The case first came on for hearing before Collins, C.J., and Shephard, J., who made the following order of reference to the Full Bench :—

## ORDER OF REFERENCE TO THE FULL BENCH.

The question, being one of general importance on which the authorities are conflicting, ought, we think, to be referred to a Full Bench.

Whether the suit for sale by a mortgagee holding such a mortgage as that in the present case, is governed by Article 132 or Article 147 of the second schedule to the Limitation Act?

The case subsequently came on for hearing before the Full Bench as constituted above after a previous hearing before a Bench of four Judges who differed.

*Rangachariar*, for appellant.—The question referred for decision is divisible into two parts as follows :—(1) Is this a suit by a mortgagee? and, (2) if so, the suit being for sale, does Article 147 or Article 132 apply? The Courts below have treated this case as a case governed by *Rangasami* v. *Muttukumarappa* (1). That is clearly wrong. The instrument is not a hypothecation but a mortgage though possession was not taken—the right to possession is enough. See also *Motiram* v. *Vitai* (2). Here a usufructuary mortgagee having a covenant to pay sues for sale. A suit for sale does lie in such cases. See *Nanu* v. *Raman* (3), *Ramayya* v. *Guruva* (4), and *Sivakami Ammal* v. *Gopala Savundram Ayyan* (5). As to the wording of Article 147 of the Limitation Act "suit for foreclosure or sale," see *Rangasami* v. *Muttukumarappa* (1). The Full Bench concedes that Article 147 would apply if the suit was one by a mortgagee. See also *Aliba* v. *Nanu* (6). The ground of decision there is that it was

(1) 10 M. 509. (2) 13 B. 90. (3) 16 M. 335 (338).
(4) 14 M. 232. (5) 17 M. 131. (6) 9 M. 218.

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not a mortgage but a mere charge; and not that [329] Article 147 is inapplicable under such circumstances as the present, which would be the case if the decision in *Girwar Singh* v. *Thakur Narain Singh* (1) were right. This suit for sale comes within the plain meaning of Article 147. Articles 147 and 148 have to be read together. With the provisions of the Act of 1877 compare Act XIV of 1859, Section 1, Clauses 12 and 15, and Act IX of 1871, Articles 132, 135, 148 and 149. There is no reason why the Legislature should not make similar provisions with regard to mortgagors and mortgagees: thus in England there is a uniform period of twelve years. Moreover, generally, the right to redeem and the right to foreclose are co-extensive. See *Vadju* v. *Vadju* (2). See also Coote on Mortgages, page 26. Compare Sections 86 and 88 of the Transfer of Property Act. If a shorter period were provided for suits by a mortgagee than that applicable to a suit by a mortgagor, the transaction would cease to be a mortgage, so far as the mortgagee is concerned, while it continued to be a mortgage as concerns the mortgagor. In a suit for foreclosure by a mortgagee by conditional sale, it was held that the period of limitation is sixty years applying Article 147 of Act XV of 1877. See *Ammanna* v. *Gurumurthi* (3). In a suit on a covenant, Collins, C.J., and Benson, J., held that the period of limitation is sixty years. See *Anantha Bhatta* v. *Holeya Deyyu* (4). But in no case in Madras, I think, is *Girwar Singh* v. *Thakur Narain Singh* (1) distinguished or even considered although the idea underlying it was considered with reference to the similar wording in Section 67 of the Transfer of Property Act, and abandoned. See *Chathu* v *Kunjan* (5) and *Venkatasami* v. *Subramanya* (6). The reason for this reference is the decision in *Girwar Singh* v. *Thakur Narain Singh*(1) where the Full Bench held that Article 147 only applies to English mortgages. The effect of that decision would be to read into the article 'by an English mortgagee.' Where the Legislature wished to limit the meaning of the word 'mortgagee,' it has taken care to so express itself. Compare the immediately preceding Article 146. Three reasons are given for coming to that decision. First, there is a sudden advance from twelve years to sixty years when in England the law was reducing the period from twenty years to twelve years. That is hardly a sufficient reason to limit the plain [330] meaning of the article. There is an advance anyhow even with regard to an English mortgagee, who had only twelve years before. No explanation could be suggested why he alone should have this extension. The opinion had been expressed in Bombay at the time, that it was desirable to extend the period for suits by all mortgagees. The Legislature in order to deal in a uniform manner with the rights of mortgagors and mortgagees had either to cut down the period of sixty years which had been previously allowed to suits by mortgagors or to extend the period in case of mortgagees. The latter was the course least open to opposition and that the Legislature adopted. The second reason assigned was that, in suits for possession by a mortgagee, only twelve years was allowed, and that for that reason it could not be held that in a suit for sale he had sixty years. The answer to that is that the correlative rights only of mortgagors and mortgagees, *i.e.*, redemption, foreclosure and sale, are provided for in Articles 147 and 148. The mortgagee's right to possession is an independent right. The third reason assigned is that Article 132 itself which was applied to suits of this kind remains unaltered. It is difficult

(1) 14 C. 730. (2) 5 B. 22. (3) 16 M. 64.
(4) 19 M. 437. (5) 12 M. 109 (111). (6) 11 M. 88.

1898 JULY 15. — FULL BENCH. — 21 M. 326 (F.B.).

to see what alteration could be made in the language of that article. Such an article is even now necessary in the case of mere chargeholders. The case of *Girwar Singh* v. *Thakur Narain Singh* (1) is dissented from in *Motiram* v. *Vitai* (2). See also *Manekji Framji* v. *Rustomji Naserwanji Mistry* (3), *Bulakhi Ganu Shet* v. *Tukarambhat* (4), *Onkar Ramshet Marwadi* v. *The Firm known as Govardhan Parshotamdas* (5) and *Venkatesh Shetti* v. *Narayan Shetti* (6). The same view has been accepted in the Allahabad High Court. See *Shib Lal* v. *Ganga Prasad* (7), *Sheoratan Kuar* v. *Mahipal Kuar* (8) and *Kishan Lal* v. *Ganga Ram* (9): And as already pointed out the Full Bench in *Rangasami* v. *Muttukumarappa* (10) concedes that Article 147 would apply in the case of a mortgage. No reason is suggested why the course of decisions in Madras should be departed from, adopted, as it is, by two other High Courts. [SUBRAMANIA AYYAR, J.—If you read the Article 147 in the distributive sense, what article would you apply when a mortgagee entitled to **[331]** sue in the alternative does sue in the alternative?] The same article would apply. It would be a suit for foreclosure or sale within the meaning of the article. [SUBRAMANIA AYYAR, J.—Then you would read it in the distributive sense in some cases and in the alternative sense in other cases?] A mortgagee can only get one of those remedies. Statutes of Limitation should be construed liberally in favour of the subject and when a given case comes within the plain meaning of Article 147, that article should be applied.

The respondent was not represented.

## JUDGMENT.

COLLINS, C.J.—The question referred to the Full Bench is whether Article 132 or Article 147 of the second schedule to the Limitation Act applies to a suit for sale by a mortgagee holding such a mortgage as that in the present case.

The Allahabad High Court has held in *Shib Lal* v. *Ganga Prasad* (7) that Article 147 is applicable to all mortgage instruments.

The Calcutta High Court has held in *Girwar Singh* v. *Thakur Narain Singh*(1) that Article 147 applies only to a special kind of mortgage known as "English mortgage," and in other cases Article 132 applies.

The Bombay High Court in *Motiram* v. *Vitai* (2) differs from *Girwar Singh* v. *Thakur Narain Singh* (1) and holds that Section 147 applies.

The Madras High Court in *Davani* v. *Ratna* (11) and *Aliba* v. *Nanu* (12), has held that Article 132 governed a suit upon a mortgage bond to recover the mortgage money by sale of the mortgaged property—although in later cases that view has been dissented from. This case has been twice argued before the Full Bench, but no one appeared for the respondent. The point, in my opinion, is one of great difficulty, and it is to be hoped that the Legislature will see fit to make the Law of Limitation definite on this very important point.

I have read with great care the decisions of the Calcutta and Bombay Courts, and the reasons given in the judgment of the learned Judges of the Calcutta High Court in *Girwar Singh* v. *Thakur Narain Singh* (1) appear to me to be sound in law, and I, **[332]** therefore, answer this reference by saying that the suit in question is governed by Article 132.

(1) 14 C. 730. (2) 13 B. 90. (3) 14 B. 269 (272). (4) 14 B. 377. (5) 14 B. 577. (6) 15 B. 183. (7) 6 A. 551. (8) 7 A. 258. (9) 13 A. 28. (10) 10 M. 509. (11) 6 M. 417. (12) 9 M. 218.

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SHEPHARD, J.—The instrument in this case is dated the 2nd July 1879, and purports to be a mortgage with possession of certain immoveable property. In addition to the ordinary words used in such an instrument there is a covenant to repay the mortgage amount. The right to possession has never been put in force, and it was presumably lost by the bar of limitation before the present suit was brought. The plaintiff comes into Court seeking to put in force the alternative remedy which the covenant in his favour gives him. If that had been the only remedy open to him under the instrument of mortgage and that remedy had been barred by the Law of Limitation, it appears to me that it must be none the less barred by the same law, because there was at one time another remedy available to the plaintiff. I think, therefore, the case may be considered without reference to the right of possession and on the supposition that the instrument is an ordinary instrument of hypothecation.

Previously to the passing of the Act of 1877 there can be no dispute that the time limited by law for suits upon such instruments brought in the Provincial Courts was twelve years. That is the period limited by the Regulation, by the Act of 1859 and by the Act of 1871. It is equally clear that no such limitation was put on the mortgagor's right of redemption. Under the Regulation there was no limit prescribed. By the Act of 1859 a limitation of sixty years in the case of immoveable property and thirty years in the case of moveable property was introduced, and the law has to that extent remained unaltered to the present day. Before the Act of 1859 came into force there was for the Supreme Court no statutory law affecting suits in equity to redeem or to foreclose. Presumably the Court acted on the principles enunciated in the English Courts prior to the passing of the Statute of William IV—I cannot find any reported cases. According to the law as then understood in England the possession of the mortgagor was a possession held by the sufferance of the mortgagee under a tacit agreement which the latter might determine at his pleasure. His possession was not wrongful or adverse, and therefore, time did not run against the mortgagee (*Keech* v. *Hall* (1), *Pugh* v. *Heath* (2)). **[333]** In the Courts of Common Law, therefore, it was always open to the mortgagee to bring ejectment against his mortgagor. In the Court of Chancery, though no time was limited for the redemption of a mortgage, the Court did in its discretion act upon the analogy of the statute and generally refused to relieve a mortgagor after twenty years' possession by the mortgagee. Fonblanque's 'Equity,' Volume I, page 323; Spence's 'Equity,' Volume II, page 709. The Act of 1859 follows the Statute of William in taking away the discretionary power of the Court and fixing a precise limit of time, which for the case of a mortgagee's suit was twelve years, no distinction being made between mortgages and mere hypothecations. Evidently this was thought to be a mistake, because in the Act of 1871 special provision of sixty years is made for the mortgagee's suit in a High Court to eject his mortgagor, though no specific or appropriate provision was made for the case of a foreclosure suit. Such being the state of the law before the Act of 1877 was passed, the contention that Article 147 of the Act was designed for all suits upon instruments of mortgage or hypothecation in which a sale only could be demanded, involves the idea that the Legislature intended to alter the law for all such suits in a direction favourable to the plaintiff. Now, if that was the intention, which

(1) 1 Smith's L.C. 574.

(2) L.R. 7 App. Cas. 235.

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in itself is not probable, one would have expected an alteration of that particular part of the Act of 1871 which referred, or had been held to refer, to suits by mortgagees upon instruments of hypothecation. The particular article of the schedule, which, as the Legislature must have known, was held applicable to such suits, was Article 132. The fact that it re-appears in the new schedule, unaltered in any point material to the present case, must, I apprehend, be taken to show that the Legislature considered it adequate for the purposes for which it had been used, and since it cannot have been intended that the two Articles 132 and 147, should apply to the same class of suits, it is more reasonable to suppose that the former was intended to perform the same functions as had been performed by the repealed article, and that the latter, a new article, was designed for some other or special class of cases. There is no difficulty in naming the class of cases which the Legislature may have had in mind. As is pointed out in *Girwar Singh* v. *Thakur Narain Singh* (1) the deficiency of the Act of 1871 in this [334] respect had been brought to light by the argument used in a case decided by Sir Charles Sargent a few months before the Act of 1877 was passed (*Ganpat Pandurang* v. *Adarji Dadabhai* (2)) and it may well have been apprehended that the Courts, considering in accordance with *Wrixon* v. *Vize* (3) that a suit to foreclose was not a suit to recover money, might hold that to such a suit Article 132 was not properly applicable. The phrase "suit for money charged upon immoveable property" or "to enforce payment of money charged upon immoveable property" does not fitly describe a suit which, while it may lead to the payment of money, is directly addressed to the recovery of the equity of redemption. On the other hand, the phrase "suit for foreclosure or sale" is a familiar mode of indicating suits such as are possible in connection with mortgages in the English form—suits which, though generally they would be brought in the High Court, might also be instituted in Provincial Courts. It must be remembered that in a suit for foreclosure, sale of the mortgaged property is not what the plaintiff immediately demands. His primary object is to call on the mortgagor to exercise his right of redemption now or never. Sale may be decreed in a foreclosure suit, but it is not so decreed as a matter of course, and it is generally in the interest of the mortgagor that it is decreed. The case is wholly different with a suit like the present or a suit brought by a person entitled to a charge. Then it is a sale that the plaintiff demands, his object being the recovery of money.

To hold that Article 132, which may be compared with Section 40 of the Statute of William IV, applies to such suits and that Article 147, serving the purpose which Sections 2 and 24 of the Statute were held to serve, applies to suits for forclosure only, requires no strain on the language of either article, whereas, according to the contrary view, Article 147 has to be read as applying to two wholly different classes of suits. Such a construction of the article appears to me unreasonable. And in addition it has to be said against it that it increases the difficulty of explaining why the long period of sixty years should have been given.

For some reason it is clear the Legislature has all along thought fit to make a distinction between such suits according to [335] the class of the Court in which they are instituted, and in effect the result of the distinction must be to favour the holder of a mortgage in the English form as compared with the holder of an ordinary hypothecation,

(1) 14 C. 730 (739). (2) 3 B. 312 (330). (3) 3 Dru. & War. 104 (120).

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for, generally speaking, it is only in the High Court that English mortgages have to be dealt with. It may not be easy to explain why such long periods as sixty years and thirty years are given for such latter mortgages, but it would be still less easy to explain why in the case of a mortgage in the ordinary form the mortgagee should be restricted to twelve years when suing for possession, but have five times as long a period when suing for sale of the mortgaged property. The construction, which I prefer to put on Article 147, involves no charge of inconsistency against the Legislature. They have consistently given an extended period to mortgagees' suits in the High Court. They have been consistent in giving the uniform period of twelve years to mortgagees' suits in other Courts. On the other hand, if the double meaning is to be assigned to Article 147, the Legislature has made a strange distinction, giving twelve years only for the mortgagee's suit for possession and sixty years for other suits by the mortgagee. That has to be explained. And further it has to be explained why the Legislature should have altered the law at all in a direction favourable to the plaintiff. It it said that it must have been thought expedient to equalize the periods for mortgagors' and mortgagees' suits. No particular reason was suggested why they should be made equal, and there are reasons why greater latitude should be allowed to the mortgagor, seeking to recover his land and at the same time offering to pay off his debt, than to the mortgagee who is only prosecuting the remedies of a creditor. If the Legislature did not approve this principle, but considered that no distinction should be made between a suit by a mortgagor and a suit by a mortgagee, it might have been expected that Article 147 in the Act of 1871, which prescribes thirty years for a suit by a pledgor of chattels to recover them from his pledgee, would disappear in the Act of 1877. It is, however, reproduced in a modified form in Article 145 of the schedule.

It was contended that this Court was committed to a view favourable to the plaintiff owing to a series of decisions on the point. That is not the view which I take of the reported cases. In the case of *Aliba* v. *Nanu* (1) this Court dealing with an instrument of **[336]** hypothecation held that Article 132 was applicable, distinctly overruling the contrary opinion expressed by the District Judge. In that case the learned Judges followed an earlier decision of this Court (*Davani* v. *Ratna*(2)). In the next case decided by a Full Bench the same view was taken and again stress is laid on the distinction to be made between instruments executed before and after July 1882 (*Rangasami* v. *Muttukumarappa*(3)). Then follows *Ammanna* v. *Gurumurthi*(4). The report does not give the text of the instrument under discussion, but it shows that the plaintiff asked for a decree for foreclosure or sale. Assuming that the instrument justified that form of prayer, the Court could hardly have hesitated to hold that Article 147 was applicable. That case, therefore, has, in my opinion, no bearing on the present. The last case is *Udayana Pillai* v. *Senthivelu Pillai* (5). It is undoubtedly an authority in the plaintiff's favour. As far as the report shows, however, the point was not argued and anyhow the case stands by itself. It is, however, argued that in some of the cases sanction is given to the theory that in construing the Limitation Act, regard must be had to the provisions of the Transfer of Property Act. In *Aliba* v. *Nanu* (1), Mr. Justice Muttusami Ayyar no doubt says that, if the instrument before

(1) 9 M. 218 (220-22). (2) 6 M. 417. (3) 10 M. 509.
(4) 16 M. 64. (5) 19 M. 411.

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him had been executed after July 1882, he should have been disposed to agree with the view taken by the Allahabad High Court, and as I have already mentioned the distinction is insisted upon in the Full Bench case (*Rangasami* v. *Muttukumarappa*(1)). That decision being a decision of five Judges, would be conclusive in the present case, because here also the instrument was executed before the Transfer of Property Act came into force, but for the circumstance that, in the present instance, there was something beyond a mere hypothecation of the property, it was intended that the mortgagee should enjoy the usufruct. But, in my opinion, the distinction founded on the date of the instrument—a distinction which is practically disregarded by the Bombay High Court—does not merit the importance which has been attached to it In interpreting an Act of 1877, I cannot see how a Court can properly take into account a Statute passed five years later. It may be true that a measure relating to the transfer of property was under consideration at the time when the Act of [337] 1877 was before the Legislature ; but if Judges may not, in construing an Act, legitimately refer to the debates and discussions which preceded the passing of it, how can they be justified in taking into consideration mere projects of legislation ? Surely the construction which should be put upon the Act by a Court sitting after July 1882 should be the same as it would have been before that date, or if the Transfer of Property Act had never in fact been passed. This observation appears to me to dispose of a material part of the argument used in the Allahabad High Court (*Shib Lal* v. *Ganga Prasad* (2)) and adopted in Bombay (*Motiram* v. *Vitai* (3)). When the point is considered apart from the Transfer of Property Act and with reference to the antecedent law and the decisions on the Act of 1871, and the Statute of William IV, the construction of Article 132 appears to me to present little difficulty. Agreeing with the decision in *Girwar Singh* v. *Thakur Narain Singh* (4), I think the article must be applied in any case where the sale of the property mortgaged or charged is demanded and a decree for foreclosure is not admissible.

I would accordingly answer the question referred by saying that the case is governed by Article 132.

SUBRAMANIA AYYAR, J.—The instrument sued upon in this case is a usufructuary mortgage executed in 1879, though, as a matter of fact, possession remained with the mortgagor. The instrument contains a covenant to pay and the suit is for the sale of the mortgaged land. The mortgage money became payable in March 1882. The suit was, however, instituted in June 1894.

The question for determination is whether the case is governed by Article 132 or by Article 147 of the Limitation Act. If the latter article does not apply the case would, of course, fall under the former. The question is indeed a difficult one, as the conflict of decisions on the point shows. According to the Full Bench rulings of the Bombay and the Allahabad High Courts the case falls under Article 147 (*Motiram* v. *Vitai*(3) and *Shib Lal* v. *Ganga Prasad* (2)). But according to the Full Bench ruling of the Calcutta High Court, Article 132 applies (*Girwar Singh* v. *Thakur Narain Singh* (4)). Which of these conclusions is correct?

[338] Before I proceed to discuss and answer the question I ought to observe that it is difficult to agree in the suggestion on which so much stress has been laid, *viz.*, that the slight alteration in the language of Article 132 as compared with the corresponding article in Act IX of 1871

(1) 10 M. 509. (2) 6 A. 551. (3) 13 B. 90. (4) 14 C. 730.

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and the insertion of a new Article, *viz.*, 147, were made with reference to the distinction between a charge and a mortgage which in this country was for the first time distinctly drawn in the Bill relating to transfer of property that came before the Legislative Council about the time the Limitation Bill of 1877 was under consideration. It was early in 1877 that the Transfer of Property Bill was sent by the Government of India to the Secretary of State for permission to introduce it in the Legislative Council. Leave was granted in April and the Bill was introduced in June 1877. Though the Bill had thus seen the light in the Legislative Council a few weeks before Act XV of 1877 was passed, yet then and long subsequently serious doubts were entertained, if not with reference to the part thereof relating to mortgages, at any rate generally, about the propriety of allowing the Bill to become law. (See particularly the Hon'ble Mr. Plowden's speech—Proceedings of the Legislative Council for 1882, pages 78 to 83.) Having regard to this circumstance and the numerous and important changes which were made in the Bill during the four years that intervened between its introduction and its becoming law, one need scarcely hesitate to say that it is exceedingly unlikely that the Legislature framed Articles 132 and 147 or any other provision in the Limitation Act in reference to what was contained in a Bill which, at that time, could not have been confidently expected to become law. Further, a comparison of the provisions of the Limitation Bill of 1877 in regard to the present matter at the different stages of its progress in the Legislative Council shows beyond doubt that the suggestion under consideration is not well founded. Now, in the Bill as it stood at the time of its introduction, the article corresponding to the present Article 132 was Article 128, and the part thereof in the first column was (as in Act IX of 1871) "for money charged upon immoveable property" (see *Gazette of India*, Part V, page 107). In the Bill, however, as revised by the Select Committee and submitted with their report of the 28th March 1877, the language of the article (numbered therein as 130) was altered as it now stands (*Ib.* page 142). That the alteration thus made was treated as unimportant (which [339] it could not have been if instead of its embracing cases of mortgagees as well as cases of chargeholders it was to be confined to the latter only) is evident by the Select Committee noticing in their report certain alterations specially, but referring to the rest as merely verbal (*Ib.* at 127 and 128). And the provision which is now Article 147 was not introduced into the Bill when the language of that which became Article 132 was amended as stated above, but was inserted later on. Moreover, at the date of that amendment the Transfer of Property Bill had not even formally come before the Council, inasmuch as the amendment was made before the end of March, while the Transfer of Property Bill was introduced only in June. As regards the insertion of the provision forming Article 147 subsequent to the amendment alluded to, that that also had likewise no connection with the Transfer of Property Bill is evident being supported by certain cogent circumstances. These, however, it would be convenient to state later on when I deal with an argument urged as to why Article 147 was introduced. It seems, therefore, quite inadmissible to attempt to interpret the articles in question in the light of the provisions of the Transfer of Property Bill.

Turning now to Article 147 itself on the proper construction of which the point entirely turns, the words in the first column are "By a mortgagee for foreclosure or sale." Now here the term 'or' may be read in the distributive or in the alternative sense. But it cannot be read in both the

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senses. If, according to the Bombay and the Allahabad Courts, it be read distributively the article would refer to suits where a mortgagee sues for foreclosure and also to suits where a mortgagee sues for sale. If so, what is the article governing cases where a mortgagee is entitled to claim in one suit either foreclosure or sale? Article 132 cannot apply to such a case, as according to the view taken by the said Courts that article is restricted to suits by persons having charges only. Is then the case of a mortgagee suing for foreclosure or sale in the alternative to fall under Article 120, the only other article that could apply? Such a result could surely not have been intended. It follows that the term 'or' must be read in the other sense, and that is its ordinary grammatical sense. The article clearly, therefore, refers to mortgagees entitled to claim foreclosure or sale in one suit—the most familiar and prominent instance of whom is a mortgagee under an English mortgage. Nor are other considerations wanting [340] to support the conclusion arrived at through the ordinary method of interpretation. It is quite true, as observed in *Datto Dudheshvar* v. *Vithu* (1) to allow mortgagees an unduly short term of limitation for enforcing their rights would act prejudicially upon mortgagors. But would other mortgagees than mortgagees under English mortgages have only such a short period for enforcing their rights? They would have from the time their cause of action accrues, and if there was an acknowledgment or a payment as provided in Sections 19 and 20 of the Act, respectively, then from the date of such acknowledgment or payment a period of twelve years—a period which had been in vogue from the beginning of the century. The question whether the period of twelve years was generally sufficient was long ago discussed and settled. The Indian Law Commissioners pointed out in 1842 that the said period first came into practice in the days of the Muhammadan Sovereigns, that so far back as 1772 the Circuit Committee took the period as the established Indian term of limitation, and that hence it came to be adopted in the Bengal and the Madras Regulations. With reference to an objection raised as to the sufficiency of such period so far as the Bombay Presidency was concerned, the Commissioners said:—"We have no reason to think that the period "of limitation which has been observed from the first establishment "of the Courts of Bengal and Madras has been found in practice "to be too contracted or that there are any peculiar circumstances "which render it advisable to allow a longer period for the acquisition of "rights of the same kind in the Presidency of Bombay" (see paragraphs 21 to 24 of the Special Report of the Indian Law Commissioners, dated the 24th December 1842). In these circumstances, it is a pertinent question to ask whether there was any good reason why the Legislature in 1877 resolved upon making the period in the case of mortgagees in general very much longer than it had been since regular administration of justice was introduced in this country. No such reason has, in my opinion, been shown. The only suggestion made as to it was, having regard to the fact that in point of law the two classes of rights are correlative, the framers of Act XV probably intended to give to the mortgagees for the enforcement of their rights the same period as that given to mortgagors with reference to their rights. That this suggestion though plausible is not correct, seems to my mind to [341] admit of no doubt. Before, however, referring to the circumstances which go far to support the above statement, I would observe that if the ground which led to the introduction of a disparity in the periods allowed

(1) 20 B. 408 (421).

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to mortgagees and mortgagors, respectively, be considered, the improbability of the idea that the Legislature extended in 1877 the period in the case of mortgagees in general would become apparent. Now, the ground for the disparity alluded to was explained in the report already cited by the Indian Law Commissioners who originally recommended the period of sixty years for mortgagors alone. The Commissioners said :—" Our provisions "on the subject of mortgages and deposits were framed with reference to the "habits of the great bulk of the people. Amongst them it is common for "possession to be left for very long periods with the mortgagee or depositary "and then to be restored to the owner. This is perfectly understood by both "parties" (paragraph 39). The ground thus assigned was peculiar to mortgagors, and though the disparity in question had given rise to no practical inconvenience or difficulty, yet that the Legislature for the mere sake of theoretical equality in point of limitation resolved upon making the period in the case of mortgagees five times longer than it had been for three-quarters of a century, is on the face of it very unlikely. The point, however, appears to be placed beyond question by what took place in the Legislative Council itself. Now under Act IX of 1871 the period of sixty years was allowed only in the three following cases :—(1) To mortgagors generally, when suing to recover possession of immoveable property mortgaged (Article 148). (2) Among mortgagees, to those instituting suits to recover possession of the mortgaged immoveable property from the mortgagors on the original side of a Court established by Royal Charter but not to those suing in any other Courts (Article 149). (3) The Secretary of State's suits (Article 150). But in the Limitation Bill of 1877 it was proposed to reduce the period in all the three cases to thirty years (see Articles Nos. 143, 144 and 145, *Gazette of India* for 1877, Part V, page 109). Referring to this proposed reduction, the then Law Member, Sir Arthur Hobhouse, stated that the 'enormous' period of sixty years " was a continuation of old law and was generally felt to be inconvenient," and that the Bill proposed " to fix the more moderate period of thirty years" (Proceedings of the Legislative Council for 1877, page 48). This opinion commended itself to the Select Committee at first, and they made no change in **[342]** the bill with reference to the three cases (see Articles 143, 144 and 145, *Gazette of India* for 1877, Part V, page 144). But later on the Committee took a different view as explained in the final report of the Select Committee, dated the 13th June 1877. There referring to Article 147 the Committee observed that the article was introduced to make the limitation for the suits therein specified " clearer." From the above references and quotations it is evident as regards the case of mortgagees with which alone we are here concerned, that there never was any intention to enlarge the period of twelve years which mofussil mortgagees had under the law till then; and that in the case of mortgagees within the jurisdiction of the Chartered Courts, the Legislature actually abridged the period formerly allowed with reference to one class of suits, *viz.*, those against mortgagors for recovery of possession (Article 146), but allowed, or as the Committee stated, restored the sixty years with reference to another class, *viz.*, those for foreclosure or sale. It is true that Article 146, which refers to suits of the former class, expressly mentions Chartered Courts, while there is no such statement in the next article relating to suits for foreclosure or sale. But as suits by mortgagees against mortgagors for possession of mortgaged property were, of course, maintainable in the mofussil Courts as well as in Chartered Courts, and as the limitation of twelve years had by Article 135 been already prescribed for such suits in the mofussil Courts, distinct

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mention of Chartered Courts was necessary in Article 146. On the other hand, suits for foreclosure or sale in the alternative were before or in 1877 entirely unknown so far as the mofussil Courts were concerned, but were sustainable in the Chartered Courts only. Consequently express allusion to the *forum* was uncalled for in Article 147. I need scarcely observe that I have referred above to the Proceedings of the Legislative Council, bearing on the present matter, not of course for the purpose of determining the meaning of the article in question, but to meet certain arguments as to the supposed intention of the Legislature founded on considerations extraneous to the language of the Statute—arguments which found acceptance in one or two cases cited for the appellant.

It remains only to add that a reason may be suggested as to why the long period of sixty years was allowed for suits for foreclosure or sale. Now the mortgagees entitled to claim such relief were mostly, if not exclusively, mortgagees under mortgages in the English form, and they had at the date of the enactment in question **[343]** the power to sell without the intervention of the Court. If in their case a shorter period than sixty years, say twelve years, were granted while the longer period provided in Article 148 continued to be the term given to mortgagors to redeem, that would lead to a very curious result. For as in such a case though a mortgagee of the class under consideration had omitted to sue for sale before the expiry of twelve years, and had thus lost his remedy of selling through Court, yet even subsequently there could be nothing on principle to prevent his proceeding to exercise his power of sale out of Court. This would be an anomaly which could only have been avoided by prescribing sixty years for suits for foreclosure or sale.

For all these reasons I am convinced that Article 147 ought to be construed in the alternative sense, and I would, in reply to the question referred for decision, say that the case is governed not by that article, but by Article 132.

BENSON, J.—The mortgage (Exhibit A) in this case is dated the 2nd July 1879. It purports to be an usufructuary mortgage, and it contains in addition a covenant to pay the money on a fixed date, *viz.*, the 8th March 1882. No doubt the Courts have found that, as a fact, the mortgagor remained in possession. I do not, however, think that this circumstance is sufficient to render the transaction a mere hypothecation. The mortgagee had the right to immediate possession at any time, and there was, therefore, a transfer of an interest in the property to him. It was more than an hypothecation or a charge on the property. It was a mortgage, and, in my opinion, Article 147 of the Limitation Act is applicable.

It has no doubt been held by the Full Bench of the Calcutta High Court (*Girwar Singh* v. *Thakur Narain Singh*(1)) that Article 147 refers only to what is known as an English mortgage, but this view has never been adopted either by this Court or by any other High Court in India. The contrary has been either assumed or expressly held in a long series of cases in this Court (*Aliba* v. *Nanu* (2)), *Rangasami* v. *Muttukumarappa* (3), *Ammanna* v. *Gurumurthi* (4), *Udayana Pillai* v. *Senthivelu Pillai* (5). The present case is similar to *Motiram* v. *Vitai* (6), in which *Girwar Singh* v. *Thakur Narain Singh* (1) was fully considered and dissented from.

(1) 14 C. 730. (2) 9 M. 218. (3) 10 M. 509.
(4) 16 M. 64. (5) 19 M. 411. (6) 13 B. 90.

[344] The reasoning in the Bombay case commends itself to me. I am not aware of any decision of this Court, which is inconsistent with the view that Article 147 is applicable to the case now before us. 1898 JULY 15.

In reply to the reference I would say that the suit is governed by Article 147. FULL BENCH.

DAVIES, J.—I concur with Benson, J. 21 M. 326 (F.B.).

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**21 M. 344 (P.C.) = 25 I.A. 102 = 2 C.W.N. 337 = 7 Sar. P.C.J 325.**

## PRIVY COUNCIL.

PRESENT:

*Lords Hobhouse, Macnaghten and Morris and Sir R. Couch.*

[*On appeal from the High Court at Madras.*]

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SRI RAJA RAU LAKSHMI KANTAIYAMMI (*Defendant*) *v.*
SRI RAJA INUGANTI RAJAGOPAL RAU (*Plaintiff*).
[18th February and 5th March, 1898.]

*Decree explained by reference to the judgment—Title of nearest reversioner.*

In a prior suit a decree of the High Court awarded to the plaintiff the substantial relief claimed by him as reversionary heir entitled to inherit after the mother of the last male owner, then deceased, she holding her limited estate in the property; and the decree declared that certain alienations made by her were invalid against the reversionary heir.

In the present suit the same plaintiff, as nearest reversioner, claimed possession of the property from the daughter of the mother, the latter having died since the prior suit; the daughter alleging title through her:

*Held*, that the judgment, in the prior suit, was admissible, and ought to be examined in the present suit, in order to see what that suit decided as to the reversioner's title.

*Kali Krishna Tagore* v. *Secretary of State for India* (15 I.A. 186 = 16 C. 173) referred to and followed.

The judgment showed that the question whether the plaintiff was the nearest reversioner having been raised in the prior suit, had been finally determined in the affirmative; and this was sufficient proof of his title in the present suit.

[**R.**, 8 O.C. 124 (127); **D.**, 9 C.W.N. 679 (687); 17 M.L.J. 423.]

APPEAL from a decree (15th March 1892) of the High Court, affirming a decree (19th December 1890) of the District Judge of Vizagapatam.

The present suit was brought on the 18th April 1888 by the respondent to establish his right to possess three proprietary estates in the Vizagapatam district, with mesne profits since 1886. [345] The last male owner was Rayadappa, who died in 1861, childless and unmarried. On his death his mother Sitaiyammi inherited these estates for the limited interest which she could possess, and she died on the 4th April 1886. On her death her daughter Kantaiyammi, defendant in this suit and now appellant (being sister of the late Rayadappa), obtained possession of the estates alleging her right to the inheritance.

The plaintiff, respondent, claimed to be the nearest surviving reversionary heir of Rayadappa and thus entitled.

He was, in fact, the adopted son of Rayadappa's first cousin Sitaramasami, who was son of the brother of Rayadappa's father.

Sitaramasami died in 1877, during the pendency of a suit which he brought in 1869 against the widow and mother Sitaiyammi, for a declaration of his reversionary right to the same properties, for which his adopted

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son, Sri Raja Inuganti Rajagopal Rau, now sued; and Sitaramasami in that suit of 1869 sued to have declared invalid, as against himself, certain alienations which Sitaiyammi had made. She defended that suit on the ground that all the properties, except one, were her stridhanam, that they never had been part of the paternal estate of her late husband, the father of Rayadappa, and that her daughter, and her daughter's adopted son were entitled to succeed to them after her own death. That suit of 1869 was not decreed till the 2nd May 1882, when Sitaramasami had been dead nearly five years, and by that time his minor adopted son above mentioned had been substituted for him, at the instance of the Court of Wards in charge of the minor's estate. The decree of the 2nd May 1882 was the basis of the present suit, in which the plaintiff's claim, he having arrived at majority, was founded exclusively on the assertion that his right to immediate possession on the death of Sitaiyammi was, in that suit, finally determined and settled as between himself and the present defendant, appellant.

The question on this appeal was whether the plaintiff's title as the nearest reversioner had been substantially in issue and finally determined in the prior suit of 1869; and, in connection with this, whether the judgment of 1882 could be referred to as affording explanation as to the title, and its grounds, the decree of that year saying nothing further than to declare him, as the representative of the original plaintiff in that suit, to be reversioner.

**[346]** The particulars of the claim of 1869 of the defence made, and of the judgment and decree thereon, as well as all the facts material to the decision of this case, are given in their Lordships' judgment.

The District Judge decreed to the plaintiff the properties that had belonged to the deceased Rayadappa on the ground of the plaintiff's having been his nearest surviving sapinda at his death, as determined in the prior suit of 1869, the matter being, in the Judge's opinion, 'res judicata.'

On an appeal to theHigh Court by the daughter Kantaiyammi, a Divisional Bench (Collins, C.J., and Parker, J.) affirmed the judgment of the First Court.

Referring to the present plaintiff having been substituted for his adoptive father in the prior suit, the Judges said that his adoption having been questioned in the proceedings in that suit, an issue was sent down on 15th April 1880 with the result that his adoption was found to be proved. They added that the appeal in that suit came on for final hearing on the 2nd May 1882, when the Advocate-General who appeared for Kantaiyammi admitted that the objection to the adoption could not be sustained; their judgment continuing thus—

"The High Court then held that it had not been shown that there "was any nearer reversioner than the present plaintiff, and granted him "a decree declaring that the alienations made by Sitaiyammi to four "different defendants were ineffectual to bind the reversioner. The first "point urged upon the Court is that the question of the plaintiff's adop- "tion is not 'res judicata' as between the parties, and that he should be "required to prove it. It is contended that under Section 357, Civil Pro- "cedure Code, two courses are open to the Court when a dispute arises as "to who is the legal representative of the deceased plaintiff, *i.e.*, the "Court may either stay the suit until the fact has been determined in "another suit, or may decide the point at or before the hearing. In this "case the latter course was taken, and as the issue was tried by a Court

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"of competent jurisdiction between the same parties litigating under the "same title, we can see no reason why the question between them should "not be 'res judicata' under Section 13. We may point out that an "appeal is provided from the order under Section 367 by Section 588, "Clause 18, which is sufficient to show that the order is not a mere "**[347]** interlocutory determination of a point necessary to be decided in "order that the suit may proceed.

"It is then urged that the plaintiff's title as reversioner to the whole "estate is not 'res judicata' by the decree in Appeal No. 96 of 1875, but "only as to those portions of which the alienations were held not binding. "It is pointed out that no declaration was given as to plaintiff's right to "succeed as reversioner to the rest of the estates. As to this objection we "may observe that no such declaration could have been given. There "was no right to consequential relief with regard to the rest of the estate "and therefore no declaratory decree could be made (*Kathama Natchiar.* v. "*Dorasinga Tever* (1)). We are of opinion, however, that the contention "of 'res judicata,' does not rest upon the fact that the subject-matter in "this suit is the same as that in the former, but because of the issues and "the findings thereon. The question (1) of the plaintiff's adoption and "(2) as to whether the estates were Sitaiyammi's stridhanam or her hus-"band's property were necessary issues in the former suit and they were "decided. The decision upon these issues was necessary, even though the "right to consequential relief and the declaration to be given thereupon "only related to portions of the estates. Independently of this, however, "we should still be of opinion that the first defendant had altogether "failed to prove that these estates were her mother's stridhanam pro-"perty."

Mr. *J.D. Mayne*, for the appellant, argued that the decree of 1882 had not definitely declared the plaintiff's title, as nearest reversioner, to the possession immediately upon the death of Sitaiyammi; and that the Courts below should not have decided in favour of the present respondent without having given to the appellant an opportunity of contesting, on the merits, her opponent's title. The High Court was in error in assuming that the decree of 1882, by implication, awarded such an immediate right of posses-sion. There was little, if anything, in the judgment in the suit that could be said to go beyond what was specified in the decree; which, in result, affirmed only the right of the reversioner not to be affected by the aliena-tions made by the widow, who for her life represented the estate. It did not attempt to fix the direct right of possession in the reversioner, now respond-ent, **[348]** immediately consequent upon the termination of the limited interest, or interests preceding his right of inheritance. It fell short of establishing the present claim.

There had been no decision in the suit of 1869, whether the daughter was, or was not, entitled to possession after the death of her mother in priority to the cousin of her deceased brother. The judgment and decree of 1882 might be correct, but the construction that the judgment covered the respondent's claim to proprietary possession, immediately upon the death of the mother, was open to dispute. The daughter's claim to succeed had not been the subject of adjudication, and was not necessarily affected by that decision. It was for the respondent to establish in the present suit his title to possession against the appellant, and there was no sufficient ground for the construction that the declaration of the

(1) 2 I.A. 169 (191).

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reversionary title carried with it the right to the possession. A succession of limited interests might intervene before the latter right, and was quite compatible with the existence of a reversionary title. Reference was made to *Kathama Natchiar* v. *Dorasinga Tever* (1).

Mr. *J. H. A. Branson*, for the respondent, contended that all that was necessary to show a complete title in the respondent to the possession of the property upon the death of Sivarammi was to be found in the judgment and decree of the High Court in 1882. That Court, upon all the facts, was in concurrence with, and had affirmed, the decision of the First Court. No part of what would belong to the plaintiff's case, if it were incumbent on him again to prove it, could be said to be additional to what had been established in the suit of 1882, so far as the plaintiff's title was concerned. The judgment of that year amounted to this, that the respondent in this case was entitled to the property as the nearest surviving male sapinda of Rayadappa, the last male owner. It had not been shown that any of the findings below were open to doubt, and on reference to the judgment it was clear that the same issue was raised then that was raised now. The plaintiff's title as nearest reversioner had been conclusively established by the judgment and decree of 1882.

Mr. *J. D. Mayne* replied.

Afterwards, on the 5th March, their Lordships' judgment was delivered by SIR RICHARD COUCH.

## JUDGMENT.

**[349]** The only question in this appeal is what is the effect of a decree of the High Court at Madras made on the 2nd of May 1882 in a suit brought by Sitaramasami against Sitaiyammi, the mother and heiress of Rayadappa deceased, who was the son of Ramarayanin, and had died unmarried and without issue. Sitaramasami was the son of a younger brother of Ramarayanin, and the plaint, which was filed in April 1869 in the Civil Court of Vizagapatam, alleged that the plaintiff was the nearest surviving heir of Rayadappa, and stated that the relief sought for was a declaration of the plaintiff's right to succeed after the death of Sitaiyammi to the enjoyment of the immoveable property described in the plaint and the annexed schedule, and a declaration that the alienations of parts of the property which had been made by Sitaiyammi to the prejudice of the reversionary right of the plaintiff to a number of persons who were also made defendants might be declared invalid or to be of no effect beyond her life. The plaint also asked for an injunction and the appointment of a receiver. The written statement of Sitaiyammi alleged that the whole of the property, except a garden, which had been granted to her son by the Zemindar of Bobbili, was her stridhan, and the estate was managed for her by her husband and son, and even if it was considered to be the acquisition of her husband, her daughter and her daughter's son were entitled to succeed to it and the plaintiff was not entitled to it in any respect. The other defendants by their written statements asked that the suit might be dismissed. At the hearing before the Civil Judge of Vizagapatam he found that the families of the brothers were divided, and the property was not the stridhan of Sitayammi and was the self-acquired property of Ramarayanin, and therefore that the plaintiff was not reversionary heir and decreed that the suit should be dismissed.

(1) 2 I.A. 169 (191).

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Sitaramasami having adopted the present appellant before the hearing he had been substituted in the suit as plaintiff and he appealed against this decree to the High Court at Madras on the ground, among others, that the Court below ought to have found that he was entitled to the property on the death of Sitaiyammi as heir of her son, the last full owner. It has been seen that Sitaiyammi alleged that her daughter and her daughter's son and not the plaintiff were entitled to succeed. The daughter is the present appellant and on the suit being remanded by the High Court to the Lower Court to enable them to be made parties to the [350] suit that was done, and the Judge made a final decree declaring the adoption of the son to be invalid and again dismissing the suit. On the appeal again coming before the High Court it delivered the following judgment:—"The Advocate-General admitted that the finding as to the "adoption of the substituted plaintiff could not be sustained, and that the "only question remaining for disposal was whether on the facts which "have been found or are no longer disputed the plaintiff is entitled to any "portion of the relief sought. It is not shown that there is any other "nearer reversioner than the plaintiff and we are unable to distinguish "this case from others in which it has been held that a reversioner "is entitled to a declaration that the acts of a Hindu lady in possession "in excess of her authority will not bind the reversion if a case is made "out for such relief." Then after saying that the Advocate-General had argued that no such case was averred or had been established the judgment says:—"He (the plaintiff) will obtain a decree declaring these alien-"ations ineffectual to bind the reversion. He has not established any "necessity for the appointment of a receiver and the issue of an injunction to "a lady in possession who may alien a property for proper purposes would "not be justifiable except under extraordinary circumstances. The residue "of the claim is, therefore, dismissed." "Therefore" refers to the reasons given in the preceding paragraph and "residue of the claim" means the appointment of a receiver and an injunction. The other questions in the suit are in their Lordships' opinion decided in favour of the plaintiff. The decree declares the plaintiff entitled to the substantial relief claimed in the plaint, and although it does not contain a declaration that the plaintiff is the nearest reversioner the judgment may be and ought to be looked at to see what was decided. The present appellant in her written statement after she had been made a defendant alleged that she and her son would be the heirs after her mother's death, and that the respondent could not be the heir. The suit being dismissed by the District Judge the plaintiff appealed to the High Court, one of his grounds of appeal being that, on the death of Sitaiyammi, he was entitled to the property as the heir of her son. The question whether he was the nearest reversioner was thus distinctly raised.

Sitaiyammi died on the 4th of April 1886, and thereupon her daughter, the present appellant, took possession of the property. On the 18th of April 1888, the respondent brought a suit against [351] the appellant and other persons, the heirs and representatives of deceased defendants in the original suit, to recover possession. The defence set up by the appellant in her written statement is that the respondent's right as the nearest reversionary heir had not been established by the decree in the suit of 1869, and he was therefore not entitled to recover the estates. The District Judge, on the 19th of December 1890, found that the respondent was the reversioner, and made a decree for possession against the first defendant Kantaiyammi, the appellant, and dismissed the suit against all

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the other defendants. Kantaiyammi appealed to the High Court on the ground that the Lower Court was wrong in deciding the plaintiff's title without framing an issue on that point and in holding that the decree in the suit of 1869 had in any way declared the title of the plaintiff. This has been the contention before their Lordships of the learned counsel for the appellant. And if only the decree could be looked at there might be some reason for it, but it would be wrong to look only at the decree. In *Kali Krishna Tagore* v. *Secretary of State for India*(1), the High Court of Bengal did this saying:—"We cannot look "to the judgment as we were asked to do in order to qualify the effect "of the decree," and their Lordships on appeal held that in order to see what was in issue in a suit or what has been heard and decided, the judgment must be looked at. They said:—"The decree, according to "the Code of Procedure, is only to state the relief granted, or other "determination of the suit. The determination may be on various "grounds, but the decree does not show on what ground, and does not "afford any information as to the matters which were in issue or have "been decided." It is plain that in the suit of 1869 it was decided by the High Court that the respondent was the nearest reversionary heir. That is conclusive between him and the appellant, and is sufficient proof of his title to enable him to recover possession of the property from her. Their Lordships will, therefore, humbly advise Her Majesty to affirm the decree of the High Court and dismiss the appeal. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant—Messrs. *Surr, Gribble & Oliver.*

Solicitors for the respondent—Messrs. *Lawford, Waterhouse & Lawford.*

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## [352] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

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KOMBI ACHEN AND OTHERS (*Plaintiffs*), *Appellants v.* KOCHUNNI (*Defendant No.* 20), *Respondent.** [17th August, 1897.]

*Civil Procedure Code —Act XIV of* 1882, *Section* 561—*Appeal dismissed for want of necessary parties—Memorandum of objections.*

The plaintiffs sued to recover possession of lands demised on kanom in Malabar. The defendants were the representatives of the mortgagee, and one (defendant No. 20) who claimed title to part of the land sought to be recovered. As to the last-mentioned part of the land, the plaintiffs obtained a decree for a portion of it only. The plaintiffs preferred an appeal bringing on to the record only defendant No. 20 who preferred a memorandum of objections. The appeal was dismissed for the reason that the mortgagee's representatives were not joined:

*Held*, that the appeal had been heard within the meaning of Civil Procedure Code, Section 561, and accordingly that the memorandum of objections should be heard.

SECOND appeal against the decree of R. S. Benson, District Judge of South Malabar, in appeal suit No. 14 of 1892, modifying the decree of

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* Second Appeal No. 351 of 1896.

(1) 15 I. A. 186=16 C. 173.

/. P. DeRozario, Subordinate Judge of South Malabar, in original suit No. 4 of 1889. 1897 AUG. 17.

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This was a suit to recover certain property demised on kanom together with arrears of purapad. The defendants were the representatives of the kanomdars and other persons claiming to be interested in the land in question and included defendant No. 20 who stated that certain land which was his property had been fraudulently included in the plaint. The Subordinate Judge passed a decree for the plaintiff which was modified on appeal by the District Judge in favour of defendant No. 20.

The plaintiffs preferred this second appeal, bringing on to the record as respondent only defendant No. 20, whose claim to the land, they contended, should have been entirely overruled. Defendant No. 20 preferred a memorandum of objections.

*Ramachandra Rau Saheb* and *Ranga Ramanujachariar*, for appellants.
*Sundara Ayyar*, for respondent.

JUDGMENT.

**[353]** The appellant has failed to join as parties to his second appeal the second defendant and eight others, who represent the mortgagee. In their absence, the decree of the Lower Court cannot be varied, and we see no sufficient reason for allowing the appellant at this stage to bring them on the record. On this ground we must dismiss the second appeal with costs.

As to the memorandum of objections, it was contended for the appellants that it cannot be heard inasmuch as the appeal has not been heard on the merits, and therefore there has been no hearing of the appeal within the meaning of Section 561, Code of Civil Procedure. We cannot accept this contention, as we consider that the question of non-joinder is one that arises in the appeal itself, and is not extraneous to it, as would be a question as to whether it was presented in proper time or not (*Ramjiwan Mal* v. *Chand Mal* (1)). Upon this question of non-joinder the appellant was heard, and it follows that there was a sufficient hearing of the appeal to entitle the respondent to be heard on his objections.

As to the merits of the objections themselves they turn on questions of fact and accordingly we dismiss them also with costs.

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APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

SETHURAYAR (*Plaintiff*), *Appellant v.* SHANMUGAM PILLAI AND ANOTHER (*Defendants Nos.* 1 *and* 2), *Respondents.**
[19th and 24th August, 1897.]

*Specific Relief Act—Act I of* 1877, *Section* 56, *Clause (b)—Trusts Act—Act II of* 1882, *Sections* 91, 95*—Civil Procedure Code—Act XIV of* 1882, *Section* 232*—Decree obtained on a benami mortgage by benamidar—Suit by real mortgagee—Declaration—Injunction.*

A mortgaged land to B as either agent or benamidar for C. B sued on the mortgage and obtained a decree. C now sued A and B for a declaration that he was entitled to the benefit of the decree and had the right to execute it, and for

* Second Appeal No. 1393 of 1896.
(1) 10 A. 587.

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an injunction restraining A from paying the money to B and B from receiving the money from him :

*Held*, that the plaintiff was entitled to the declaration, but not to the injunction.

[R., 17 C.L.J. 30 (32) ; 1 N.L.R. 49 (51).]

[354] SECOND appeal against the decree of H. T. Ross, District Judge of Tinnevelly, in appeal suit No. 161 of 1895, reversing the decree of A. David Pillai, District Munsif of Ambasamudram, in original suit No. 213 of 1894.

The material allegations in the plaint were as follows :—

"For the sum of Rs. 163-8-6 due for paddy and for Rs. 3 due in "ready cash, both amounting to Rs. 166-8-6, payable by the second "defendant to the said zemin according to the custom of the said "zemin and as per terms of the patta for fasli 1296, a registered "hypothecation deed was obtained for the plaintiff from the second "defendant on the 7th September 1888 in the name of the first "defendant, who was at that time the sampirathi of the said zemin on "the security of the property mentioned in the list, with stipulations "that, out of the said sum, Rs. 83 and the interest due on the whole "(principal) sum at the rate of 1 per cent. per mensem should be paid on "the 14th October 1888 (corresponding to 30th Perattasi of Andu 1064), "and that the remaining sum of Rs. 83-8-6 should be paid with interest "at the same rate on 10th April 1889 (corresponding to 30th Panguni of "the said Andu), and that, if there be default in paying on the first "instalment, the whole amount should be paid in a lump with interest "at the said rate without regard to subsequent instalment, and with "some other stipulations. The said deed was kept among the said "zemin records.

"It is come to be known that the first defendant had, before being "dismissed from the said post of sampirathi, fraudulently taken away the "said hypothecation deed and has, concealing the truth, fraudulently in-"stituted a suit as plaintiff against the said second defendant in original "suit No. 152 of 1892 on the file of the District Munsif of Ambasamud-"ram as if the said document was only executed for his own benefit; "that he has obtained a decree, and that, on his application for a public "auction-sale of the said property, the sale of the said property is fixed "for the 29th instant."

The plaintiff claiming that defendant No. 1 had no right to the amount secured by the hypothecation deed or to the benefit of the decree obtained thereon, prayed for a decree as follows :—

"(1) Declaring that, as the amount of the decree in original "suit No. 152 of 1892 on this Court's file referred to above, namely, "Rs. 338-5-3, together with subsequent interest thereon, [355] belong to "the plaintiff, and as the first defendant has no right whatever therein, "the plaintiff has the right to be in the position of the first defendant in "the said decree in original suit No. 152 of 1892 and to take out execu-"tion and to recover the amount.

"(2) Issuing a permanent injunction against the first defendant "prohibiting him from ever recovering the amount, &c., of the said origi-"nal suit No. 152 of 1892, and against the second defendant prohibiting "him from paying the said amount, &c., to the first defendant.

"(3) Granting such further relief as the nature of this suit may demand and as the Court may deem proper."

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The District Munsif held that the bond in question in original suit No. 152 of 1892 was executed for the benefit of the plaintiff and not for that of the first defendant, and that the former and not the latter was entitled to the benefit of the decree. He accordingly passed a decree as follows:—"That plaintiff is declared to be entitled to the amount of "the decree in original suit No. 152 of 1892 and to apply for execution of "the said decree; that first defendant is restrained from receiving the "said amount from second defendant and the second defendant from "paying the said amount to first defendant."

The District Judge reversed the decree and dismissed the suit on the ground that it was not maintainable by the plaintiff.

The plaintiff preferred this second appeal.

*Pattabhirama Ayyar* and *Sivarama Ayyar*, for appellant.

*V. Krishnasami Ayyar*, for respondent.

## JUDGMENT.

Upon the allegations of the plaintiff, his case may be considered on the footing either that the first defendant was his agent, or that he was his benamidar. If first defendant was an agent, the plaintiff is entitled to obtain the advantage gained by the first defendant in securing a decree upon the bond. Whether first defendant's action in obtaining the decree was rightful or wrongful is immaterial. This has long been established law (*Taylor* v. *Plumer* (1)).

If first defendant was a benamidar, the result would be the same, for he would be in the position of a trustee (Sections 91 and 95 of the Indian Trusts Act, 1882).

[356] The only remaining question is as to the relief to be given. The injunction prayed for cannot be granted under Section 56, Clause (*b*) of the Specific Relief Act; but, if the plaintiff's case be true, he is entitled to the declaration granted by the Munsif subject to the plaintiff reimbursing the first defendant the costs incurred by him in obtaining the decree.

It was contended that such declaration would be fruitless and should not be granted, but we do not agree in this view. Such a declaration being binding on the parties would entitle the plaintiff to apply for the execution of the decree under Section 232 of the Code of Civil Procedure, which has been held applicable to a case like the present (*Umasoondury Dassy* v. *Brojonath Bhuttacharjee* (2)).

The Judge was therefore wrong in holding that this suit was not maintainable. We accordingly reverse his decree and remand the appeal for disposal on the merits in the light of the above observations. Costs will abide and follow the result.

No order is necessary on the memorandum of objections as the Lower Court's decree has been reversed.

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(1) 3 M. & S. 562.

(2) 16 C. 347.

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## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Boddam.*

RAMAYYAR (*Counter-petitioner-Plaintiff*), *Appellant v.*
RAMAYYAR (*Petitioner-Defendant*), *Respondent.**
[4th November, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Sections* 244, 258, 311—*Uncertified adjustment out of Court with a decree-holder—Subsequent execution—Fraud of decree-holder.*

An adjustment was made out of Court between a decree-holder and a judgment-debtor in August 1893, but it was not certified to the Court. The decree-holder falsely stated to the judgment-debtor's agent that the requisite petition certifying the adjustment had been presented: but nevertheless he proceeded with execution, applied for and obtained leave to bid at the Court-sale and himself purchased the property in September. The judgment-debtor preferred petitions in September and November praying that the sale be set aside.

*Held*, that the judgment-debtor was entitled to prove the adjustment, and to have the sale set aside.

[N.F., 17 M.L.J. 527; F., 24 M.L.J. 541 (544) = 10 M.L.T. 396 = (1911) 2 M.W.N. 473; R., 12 C.L.J. 312 (317) = 7 Ind. Cas. 55; 16 C.L.J. 174 (177) = 16 C.W.N. 923 = 13 Ind. Cas. 63; **Doubted**, 29 M. 312 = 16 M.L.J. 33.]

**[357]** APPEAL against the order of S. Gopala Chari, Subordinate Judge of Tinnevelly, in appeal suit No. 95 of 1894, reversing the order of J. Solomon Gnaniyar Nadar, Acting District Munsif of Ambasamudram, in miscellaneous petitions Nos. 532 and 458 of 1893.

These were applications by a judgment-debtor whose property had been attached in execution of the decree and with the leave of the Court purchased by the decree-holder. The first application was preferred under Civil Procedure Code, Section 311, and it was therein alleged that the decree had been adjusted by agreement and that it was arranged that the decree-holder should report the adjustment to the Court and it was prayed that the sale be set aside. The second petition was presented under Civil Procedure Code, Section 244, and proceeded on the same facts. The first petition under Section 311 was disallowed on the ground that the allegations made did not satisfy the requirements of that section. The second petition under Section 244 was rejected on the ground that it could not be entertained, as the defendant had omitted to report the adjustment to Court under Section 258. The Subordinate Judge, however, on appeal reversed the orders appealed against and set aside the sale, holding that the allegations of the judgment-debtor were proved.

The decree-holder preferred this appeal on the following among other grounds :—

"2. No facts have been proved by the defendant to justify the Court "in setting aside the sale.

"3. No evidence ought to have been admitted by the Judge to prove "the alleged agreement, as neither the decree-holder had certified it in "Court, nor the judgment-debtor applied to compel the decree-holder to "certify within the statutory period.

"5. Assuming there was such an agreement and breach, the defend-"ant's remedy is not in execution proceedings."

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* Appeal against Appellate Order No. 23 of 1896.

*Sankaran Nayar*, for appellant. 1897
*Ramakrishna Ayyar*, for respondent. Nov. 4.

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JUDGMENT.

On the 3rd August 1893 there was an adjustment out of Court between the decree-holder and the judgment-debtor. On the 19th August it was falsely represented to the judgment-debtor's brother-in-law who acted for him, that the requisite petition certifying adjustment to the Court had been presented; notwithstanding that, the decree-holder proceeded with the execution and obtained leave to bid at the sale which took place on the 1st [358] September. The fact of the sale came to the knowledge of the judgment-debtor on the 3rd September and on the 21st September he put in a petition under Section 311 of the Code following it up with another petition of the 15th November under Section 244. In these petitions the above facts found by the Subordinate Judge are stated. The District Munsif dismissed the petition holding that, under Section 258, the Court could not recognize adjustment made out of Court and not duly certified. We are of opinion that the proviso to Section 258 does not absolutely preclude proof of an uncertified adjustment. It only declares that it shall not be recognized as such by the Court executing the decree. However, the judgment-debtor does not rely on the adjustment as an adjustment, but only as a step in proving the fraud committed on himself and on the Court.

We think, therefore, that this proviso does not stand in the way of the judgment-debtor proving the fraud of which he complains. That there has been a fraud on the Court and on the judgment-debtor is found by the Subordinate Judge, and there can be no doubt about it. It is clear that, if the Court had been apprised of the facts, the decree-holder would not have had leave to bid and the sale would never have taken place. It would be monstrous to hold that a Court upon which such fraud as is proved in the present case has been committed is nevertheless bound to confirm the sale (*Sabbaji Rau* v. *Srinivasa Rau* (1)).

We dismiss the appeal with costs.

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**21 M. 358 (F.B.).**

## APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Shephard, Mr. Justice Subramania Ayyar, Mr. Justice Davies, and Mr. Justice Boddam.*

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REFERENCE UNDER STAMP ACT, SECTION 46.*
[5th November, 1897.]

*Stamp Act—Act I of* 1879, *Section* 3, *Clauses* (12), (13)—*Lease—Mortgage.*

An instrument, therein described as a lease, was executed in consideration of one hundred and twenty rupees, and it provided that the party paying that sum should remain in possession of certain land for twelve years but contained no provision for repayment of that sum or for the payment of rent:

*Held*, that the instrument was a usufructuary mortgage and not a lease.

[359] CASE referred by the Board of Revenue for the opinion of the High Court under Stamp Act, 1879, Section 46.

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* Referred Case No. 19 of 1897.

(1) 2 M. 264.

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—
21 M. 358
(F.B.).

The case was referred with, *inter alia*, the following observations:—
"It will be observed that in satisfaction of a sum of rupees one hundred and twenty comprising rupees eighty made up of rupees fifty-three, principal and interest, due on a former document, and of rupees twenty seven, loan taken on the date of the document, and rupees forty, future interest on the above sum of rupees eighty calculated at eight annas for every rupee, the claimant under the document is to enjoy for twelve years certain specified lands of the executant which are already in the claimant's possession at an annual rent of rupees ten as agreed between them, that the claimant should pay a road-cess of annas six every year for the said land and that he should deliver back the lands and the document to the executant at the end of the twelfth year." *Reference under Stamp Act, Section* 46 (1), was quoted as supporting the view that the document should be stamped as a lease and not as a mortgage.

The document in question was as follows:—

"Lease deed of a piece of land, dated 16th June 1896, corresponding to Tuesday the fifth day after the new-moon in the third month of Durmukhi year made in favour of Pedda Appalasami Garu, son of Rapeti Appadu, Gavara caste, cultivator, residing in Venkapalam, hamlet of Sitanagaram, attached to Anakapalle sub-district, Anakapalle taluk, Vizagapatam District, by Ramadu and Ammatalligadu both sons of Marvadapudi Gangadu, Chuckler's caste, service inamdars, residing in Sitanagaram of Anakapalle sub-district of Anakapalle taluk of the said district.

"The amount of principal and interest as per document executed by us in your favour on the 31st July 1891 is rupees fifty-three and the amount due as per grain and cash account struck between us, both parties being present, is rupees twenty-seven, making a total of rupees eighty. Adding to this principal, rupees forty, future interest, at half a rupee, for every rupee, the total comes to Rs. 120 (in letters rupees one hundred and twenty). For the above you are to enjoy for twelve years from **[360]** this date to the end of Plavanga year the income of our service inam dry half a visam land of our ancestors, lying within the boundaries hereunder given, already in your possession and enjoyment the rent whereof has been agreed between us to be rupees ten a year. The said land is situated in Venkapalam to the south of Venkapalam of Sitanagaram, hamlet attached to Anandaparam Tana, Vizianagram Samastanam, Anakapalle sub-district, Anakapalle taluk, Vizagapatam District. Besides you will have to pay road-cess six annas for the said land. At the end of the period our land and document should be delivered to us."

Counsel were not instructed.

## JUDGMENT.

In our opinion this is a usufructuary mortgage under which the rents and profits were estimated to satisfy both principal and interest, and accordingly no accounting on either side would become necessary. The case is quite different from that to which the Board refer.

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(1) 7 M. 203.

21 M. 360 (F.B.)=1 Weir 659.

1897 Nov. 10. — Full Bench. — 21 M. 360 (F.B.) = 1 Weir 659.

## APPELLATE CRIMINAL—FULL BENCH.

*Before Mr. Justice Shephard, Mr. Justice Subramania Ayyar, Mr. Justice Davies, and Mr. Justice Boddam.*

QUEEN-EMPRESS *v.* JAYARAMI REDDI.*
[16th September, 5th and 10th November, 1897.]

*Arms Act—Act XI of* 1878, *Section* 4—*Possession of unserviceable fire-arm without a license.*

A revolver with a broken trigger is within the definition of "arms" in Indian Arms Act, 1878, Section 4.

Whether in any particular case an instrument is a fire-arm or not, is a question of fact to be determined according to circumstances, and the circumstance that it is in an unserviceable condition is not conclusive.

[F., 6 P.R. 1908 (Cr.)=14 P.W.R. 1908 (Cr.); 5 Cr.L.J. 435=3 N.L.R. 53 (55); R., 11 Cr.L.J. 421=6 Ind.Cas. 952=16 P.R. 1910=91 P.L.R. 1910=23 P.W.R. 1910 (Cr.); 72 P.W.R. 1910; 1 S.L.R. 18 (19).]

APPEAL on behalf of Government under Criminal Procedure Code, Section 417, against the judgment of acquittal pronounced by W. G, Underwood, Sessions Judge of Cuddapah, in criminal [361] appeal No. 8 of 1897, reversing a conviction by A. T. Forbes, Acting Joint Magistrate of Cuddapah, under Indian Arms Act XI of 1878, Section 19, Clause (*b*).

The accused was prosecuted and convicted by the Acting Joint Magistrate of the offence of possessing a gun without a license after having been dispossessed of arms by the District Magistrate. It appeared that the revolver in question was of good make, but the spring of the trigger was broken, and it was accordingly not serviceable at the time when it was in the possession of the accused. It was also found that at the cost of a few rupees it could have been repaired and rendered serviceable. On these facts the Sessions Judge held that the revolver did not come within the definition of "arms" and accordingly reversed the conviction.

The present appeal was preferred on behalf of the Crown.

The appeal having come on for hearing before COLLINS, C. J., and BENSON, J., they made the following order of reference to the Full Bench:—

### ORDER OF REFERENCE TO THE FULL BENCH.

In view to the manner in which the case of *The Queen* v. *Siddappa* (1) has been interpreted by the Lower Appellate Court, and as we find it impossible to hold that a revolver, the trigger of which is out of order, does not, for that reason, come within the definition of "arms" in Section 4 of the Arms Act (XI of 1878), we resolve to refer the case to a Full Bench to decide whether the ruling in *The Queen* v. *Siddappa*(1) is correct, and to consider whether the revolver in the present case does or does not come within the definition of "arms" in the said Act.

This case next came on for hearing before the Full Bench constituted as above.

The Public Prosecutor (Mr. *E. B. Powell*), for the Crown, contended that the offence was established although the revolver was not serviceable

* Criminal Appeal No. 411 of 1897.

(1) 6 M. 60.

1897 Nov. 10. — FULL BENCH. — 21 M. 360 (F.B.) = 1 Weir 659.

as such in the condition in which it was purchased and was in the possession of the accused. The object of the Act was to secure that information of the possession of arms and ammunition should be furnished to Government, and the possession kept under the control of Government. The actual condition in which a weapon is, is immaterial. Whether for instance fifty thousand stocks and fifty thousand barrels are imported separately **[362]** or are imported together as fifty thousand complete weapons is entirely immaterial. Section 4 of the Act clearly applies to parts of weapons. [SUBRAMANIA AYYAR, J.—Would you contend that each portion or a part of a gun was within the definition of "arms"?] If it were absolutely unserviceable, I would not contend that it were so, but it is otherwise, if it can be rendered serviceable. The decision in *The Queen* v. *Siddappa*(1) defeats the policy of the Act and places an unreasonable construction upon its terms. If that decision be maintained, it would be open to anybody possessing a revolver to remove the screw of the trigger and thus render it unserviceable as a weapon and thereby to evade the provisions of the law. Moreover, in the present case, the accused purchased with the revolver a supply of ammunition and in respect of this he is liable. [DAVIES, J.—He has not been charged with committing an offence as to the ammunition.] That is true, but the circumstance shows the intention with which the revolver was purchased.

Mr. *N. Subramanyam*, for the accused ; It has been found, as a matter of fact, that the revolver was unserviceable. [SHEPHARD, J.—What has the question of its being serviceable to do with the matter? Is it not a gun?] It ceases to be a gun when it cannot be used as such. In its present state it is not a gun. The only possible test is that stated in *The Queen* v. *Siddappa*(1). Any other test would bring within the purview of the section arms which were kept as relics or curiosities.

## JUDGMENT OF THE FULL BENCH.

We think there is no doubt that the revolver in a case is a fire-arm within the meaning of the Act. The question is not so much whether the particular weapon is serviceable as a fire-arm, but whether it has lost its specific character and has so ceased to be a fire-arm. In referring to the serviceable character of the arm we think the decision in *The Queen* v. *Siddappa*(1) was not correct and that the proper test was lost sight of. Whether in any particular case the instrument is a fire-arm or not, is a question of fact to be determined according to circumstances. We answer the question in the affirmative.

This case again coming on for final disposal after the expression of the opinion of the Full Bench, the Court (COLLINS, C.J. and BENSON, J.) delivered the following

## [363] JUDGMENT OF THE DIVISION BENCH.

The ruling of the Full Bench renders it necessary to set aside the acquittal. We accordingly do this, and we restore the conviction and sentence passed by the Joint Magistrate.

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(1) 6 M. 60.

**21 M. 363.**

1897 NOV. 12. — APPEL-LATE CIVIL. — 21 M. 363.

## APPELLATE CIVIL.

*Before Mr. Justice Davies and Mr. Justice Boddam.*

GIDDAYYA (*Plaintiff*), *Petitioner v.* JAGANNATHA RAU (*Defendant*), *Respondent.** [12th November, 1897.]

*Village Courts Act* (*Madras*)—*Act I of* 1889, *Section* 73—*Power of District Munsif on revision.*

A District Munsif has no jurisdiction to reverse the decree of a Village Munsif on a question of evidence; he can only revise the proceedings of Village Courts on the grounds mentioned in Section 73 of the Village Courts Act.

PETITION under Civil Procedure Code, Section 622, praying the High Court to revise the proceedings of the District Munsif of Kurnool, in civil miscellaneous petition No. 560 of 1896, by which he reversed the decree of the Village Munsif of Kurnool in original suit No. 118 of 1896.

This was a suit for Rs. 9-10-7, and the Village Munsif passed a decree for the plaintiff. The District Munsif reversed the decree saying:—"I have carefully gone through the record, and the plaintiff's account is "not free from suspicion. The reasons given by the Village Munsif for "giving a decree in plaintiff's favour do not seem to be sound. He seems "to have been led away merely by probabilities . . . . . . The "explanation given by plaintiff in regard to his accounts is not satis-"factory."

The plaintiff preferred this petition.

*Narayana Ayyangar* and *Balarama Rau*, for petitioner.

Mr. *S. H. Bilgrami*, *Nizam-ud-din Saheb* and *Hyder Sheriff Sahib*, for respondent.

## JUDGMENT.

The District Munsif has treated the matter as an appeal and has exceeded his jurisdiction, which, by Section 73 of **[364]** the Village Courts Act, 1889, is confined to the revision of Village Courts' proceedings on the grounds there specified, on none of which did his judgment in this case proceed. His judgment in this case is on the appreciation of evidence as if it were an appeal.

We must allow this petition and reverse the order of the District Munsif and restore the decree of the Village Munsif with costs in this and in the District Munsif's Court.

* Civil Revision Petition No. 520 of 1896.

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APPEL-
LATE
CIVIL.

21 M. 364.

21 M. 364.

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

SUBBARAYA RAVUTHAMINDA NAINAR (*Defendant No.* 1), *Appellant v.* PONNUSAMI NADAR AND OTHERS (*Plaintiffs*), *Respondents.** [27th, 28th and 29th October and 1st, 2nd, 3rd, 4th and 16th November, 1897.]

*Transfer of Property Act—Act IV of* 1882, *Section* 36—*Mortgage decree—Interest—Contract rate—Subsequent interest—Civil Procedure Code--Act XIV of* 1882, *Section* 209.

When a decree for sale is passed in a mortgage suit, interest at the contract rate should be decreed for the period allowed for payment by the mortgagor, and subsequent interest should be decreed at six per cent. only.

[R., 21 A. 361 (F.B.); 23 A. 181 (P.C.)=3 Bom. L.R. 51=5 C.W.N. 137=28 I.A. 135=7 Sar. P.C.J. 792; 34 C. 150=4 A. L. J. 109=9 Bom. L.R. 304=5 C.L.J. 106=11 C.W.N. 249=17 M.L.J. 43=2 M.L.T. 75; 29 M. 170=16 M.L.J. 133; 8 M.L.T. 387; 1 N.L.R. 43; 2 O.C. 37.]

APPEAL against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in original suit No. 33 of 1893.

This was a suit to recover Rs. 24,000, principal and Rs. 41,319, interest, due on a mortgage bond, dated the 17th of January 1881, and executed by defendant No. 1 on behalf of defendant No. 2 in favour of one Tavasumuttu Nadar, brother of plaintiff No. 1 and father of plaintiffs Nos. 2 to 4. The provisions in the mortgage bond regarding interest stipulated that the interest accruing at the rate of ten annas per cent. per mensem be paid on the 17th of January of each year; that, in default, interest be charged at twelve annas per cent. from date of default; that the principal amount be paid on the expiry of seven years; and that, in default, the same be paid with interest at one anna per cent. from date of default.

**[365]** The defendants pleaded that the mortgage has been discharged. This plea was found to be false in a suit between the same parties which resulted in the appeal referred to in the first sentence of the judgment below.

The Subordinate Judge found that the amount due for interest up to the date of the suit was Rs. 38,095, and he passed a decree as follows :—

"That the defendants do pay plaintiffs in six months from to-day "Rs. 62,095, and proportionate costs and interest on Rs. 24,000 from the "plaint date, that is, 20th of July 1893, at twelve per cent. per annum, "and that, in default of payment of the sums aforesaid, on or before the "date specified, the said hypothecated property or a sufficient portion "thereof be sold, &c."

The defendant preferred this appeal.

*V. Krishnasami Ayyar* and *Natesa Ayyar*, for appellant.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*) and *Pattabhirama Ayyar*, for respondents.

## JUDGMENT.

As to the plea of discharge it is dismissed under our judgment in *Subbaraya Ravuthaminda Nainar* v. *Ponnusami Nadar* (1). As to the

* Appeal No. 14 of 1896.

(1) Appeal No. 48 of 1896 (unreported).

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rate of interest allowed by the Subordinate Judge his decree must be modified by directing that the twelve per cent. per annum, the contract rate, be allowed only for the six months within which payment was ordered by the decree (see our judgment in *Subbaraya Ravuthaminda Nainar* v. *Ponnusami Nadar* (1), and *Surya Narain Singh* v. *Jogendra Narain Roy Chowdhury* (2). Subsequent to that period, the plaintiff is entitled, in our opinion, to interest at six per cent. per annum, and it will be so decreed (*Poresh Nath Mojumdar* v. *Ramjodu Mojumdar* (3), and *Achalabala Bose* v. *Surendra Nath Dey* (4), the ruling in *Amolak Ram* v. *Lachmi Narain* (5) notwithstanding.

The parties will bear their own costs.

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**21 M. 366.**

## [366] APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.*

MARIMUTHU (*Plaintiff*), *Petitioner v.* SAMINATHA PILLAI (*Defendant*), *Respondent.** [29th November, 1897.]

*Partnership—Settlement of accounts—Promise to pay balance.*

The plaintiff and defendant having carried on business in partnership, settled their accounts and struck a balance of Rs. 196, which the defendant agreed orally to pay in a month. The plaintiff now sued in a Small Cause Court for the amount not asking for an account to be taken;

*Held*, that the suit was maintainable.

PETITION under Provincial Small Cause Courts Act IX of 1887, Section 25, praying the High Court to revise the proceedings of P. Narayanasami Ayyar, Subordinate Judge of Negapatam, in small cause suit No. 1263 of 1896.

Suit for Rs. 196. The Subordinate Judge said:—

"It is seen from the plaint that the parties were trading in partner-"ship in cocoanuts from March 1894 to February 1895, and that there "were accounts of the partnership trade. It is alleged that, in the be-"ginning of March 1895, they orally settled accounts and struck a balance "of Rs. 196, which defendant agreed to pay in one month. This suit is "based upon that oral promise to pay within one month, and the cause "of action is given as the date on which he agreed to pay which he failed. "The question is whether the oral promise will amount to a new contract "on which the suit can be based. The Madras High Court have held in "*Amathu* v. *Muthayya*(6) that such a transaction cannot amount to a new "contract extinguishing the old cause of action. This suit ought to have "been based upon the partnership dealings and brought for dissolution and "winding up of the partnership business. The oral settlement and pro-"mise cannot form a new contract to sue upon. I, therefore, find the "issue in the negative and dismiss the suit with costs."

The plaintiff preferred this petition.

*Tangavelu Chetti*, for petitioner.

*Sundara Ayyar*, for respondent.

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* Civil Revision Petition No. 46 of 1897.

(1) Appeal No. 13 of 1896 (unreported). (2) 20 C. 360. (3) 16 C. 246.
(4) 24 C. 766. (5) 19 A. 174. (6) 16 M. 339.

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21 M. 366.

## JUDGMENT.

[367] All we have to say is whether, on the face of the plaint, a good cause of action is disclosed. The allegation of partnership dealings and of the settlement of accounts between the partners followed by a promise on the part of one partner to pay a liquidated sum to the other amounts to a contract supported by good consideration, and the law does not require it to be in writing. The case of *Amuthu* v. *Muthayya*(1) does not appear to be a case of mutual dealings. The case in *Hirada Karibasappah* v. *Gadigi Muddappa*(2) is more in point.

We must reverse the decree and remand the suit for disposal on the merits. Costs will be provided for in the revised decree.

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21 M. 367.

## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.*

FISCHER (*Defendant No.* 2), *Petitioner v.* TWIGG AND OTHERS *Plaintiffs and Defendant No.* 3), *Respondents.**
[29th November, 1897.]

*District Municipalities Act (Madras)—Act IV of* 1884, *Sections* 63, 262—*House-tax assessed on school buildings.—Suit to recover tax payable under protest.*

House-tax and water-tax was levied under the District Municipalities Act (Madras), 1884, Section 63, on the School buildings of the Native College Madura (which were exclusively used for charitable purposes), and was paid by the managers of the college, who sued in the Small Cause Court to recover the amount :

*Held*, that the tax was illegal and the plaintiffs were entitled to recover.

[R., 6 Ind. Cas. 675 (680).]

PETITION under Provincial Small Cause Courts Act IX of 1887, Section 25, praying the High Court to revise the proceedings of T. Ramasami Ayyangar, Subordinate Judge of Madura (West), in small cause suit No. 652 of 1896.

Suit for Rs. 124 paid under protest on account of house-tax and water-tax by the plaintiffs, who were the members of the Managing Committee of the Native College, Madura, to defendant No. 1 impleaded as the Municipal Council of Madura, of which defendant No. 2 was Chairman. The tax had been levied in respect of the college buildings.

[368] "Plaintiffs' case," said the Subordinate Judge, "is that the "buildings are the property of Government, and have been lent to the "plaintiffs free of rent for being used exclusively for educational purposes, "that the Native College is not a proprietary institution managed by the "plaintiffs for their own benefit, but it is purely a public one, the income "derived from fees and other sources being wholly spent for the promo-"tion and encouragement of education, that the college buildings are "exclusively used for charitable purposes, and as such, are not liable to "municipal taxation under Section 63 (1) of the District Municipalities "Act IV of 1884 (Madras)."

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* Civil Revision Petition No. 52 of 1897.

(1) 16 M. 339.

(2) 6 M.H.C.R. 197.

The Subordinate Judge passed a decree for the plaintiffs. He said, *inter alia*, "I have no doubt that the college buildings at Madura are "used exclusively for charitable purposes. The payment of fees by the "students and the grant given by the Government and the municipality "would not destroy or take away the real purpose for which the buildings "are used."

Defendant No. 2 preferred this petition.

*Rangachariar*, for petitioner.

*V. Krishnasami Ayyar*, for respondents.

## JUDGMENT.

It must be assumed that the school buildings are buildings exclusively used for charitable purposes. That being so the buildings are exempted from the operation of the notification that may be made under Section 63 of the Act. A tax upon such buildings and other similar buildings mentioned in the exception is not one which can be in legal existence, and therefore it cannot be said that the tax was collected under the Act. The case is thus distinguishable from the case relied upon by the petitioner's vakil (*Municipal Council, Nellore* v. *Rangayya*(1)). We prefer to base our judgment on the ground that an imposition, which is expressly prohibited by the Act, cannot be deemed to be made under the provisions of the Act, rather than on the ground that the case is one in which the party aggrieved is protected by the proviso to Section 262.

We dismiss the petition with costs.

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**21 M. 369=8 M.L.J. 6.**

## [369] APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Benson.*

KUPPUSAMI CHETTI (*Defendant No.* 1), *Appellant* v. PAPATHI AMMAL AND ANOTHER (*Plaintiff and Defendant No.* 2), *Respondents.** [29th November, 1897.]

*Transfer of Property Act—Act IV of* 1882, *Sections* 60, 82—*Partial redemption—Contribution.*

A mortgaged two houses to B for Rs. 200. C purchased at a Court-sale A's interest in one of the houses and sold it to the plaintiff. The plaintiff sued to redeem the house and prayed that the mortgagee be ordered to convey it to her on payment of Rs. 100:

*Held*, that the suit should be dismissed.

APPEAL against the decree of P. Srinivasa Rau, Judge of the Madras City Civil Court, in original suit No. 159 of 1895.

This was a redemption suit and the facts were as follow:—

In 1873 one Ramakistna Naik, since deceased, and defendant No. 2 mortgaged two houses to one Bava Kistnappa Chetti, since deceased, and defendant No. 1, to secure the sum of Rs. 200 together with interest; and in 1874 one Tiruvengadasami Naik obtained a decree against the mortgagors in execution of which he attached and brought to sale and with leave of the Court purchased one of the houses subject to the mortgage, and in

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* City Civil Court Appeal No. 1 of 1897.

(1) 19 M. 10.

1897 NOV. 29. — APPELLATE CIVIL. — 21 M. 369 = 8 M.L.J. 6.

1895 Tiruvengadasami Naik conveyed his interest therein to the plaintiff. The plaint contained, *inter alia*, the following allegations:—" By apportioning the principal sum of Rs. 200 between the two items of the mortgaged property, there is now due in respect of house premises No. 31 aforesaid by the mortgagor to the mortgagee Rs. 100, which sum the plaintiff is ready and willing to pay to the defendant, of which the defendant before filing this plaint had notice."

The prayer of the plaint was as follows :—

" That she may redeem the plaint premises, being one of the items of the mortgage referred to in the plaint.

**[370]** " That the defendant may be ordered to reconvey the said premises to her upon payment of the said sum of Rs. 100 with such costs as the Court may order to be named by the Court."

The chief issues settled were the first and the third which were as follow :—

" 1. Whether the plaintiff's vendor had a right to redeem the plaint property ?

" 3. If, under any circumstances, the plaintiff is entitled to redeem the property, what is the sum of money which he should pay for the redemption ?"

As to these issues the Judge said—

" As to the first issue—it is quite clear that plaintiff's vendor Tiruvengadasami Naik had a perfect right to redeem the property, for he purchased the same when sold in execution of the decree passed in original suit No. 794 of 1873 by the High Court against the owners of the property, *viz.*, the second defendant and deceased Ramakistna Naik; and the sale was duly confirmed (Exhibits B, C and D). And hence it follows that the plaintiff, who purchased the property from the said Tiruvengadasami Naik, is entitled to redeem the property on his own account. I find the first issue in plaintiff's favour."

" As to the third issue—this is the most practical issue; in fact this is the only real issue to be determined in the suit,—namely, what is the sum of money which the plaintiff has to pay to first defendant for redeeming the plaint house No. 31 ?

" First as to the principal amount of the mortgage debt. Admittedly the debt was Rs. 200; and for this, two houses were mortgaged, *viz.*, the plaint house No. 31 and another house No. 39. The first defendant requires that the plaintiff should pay him the whole of this amount of Rs. 200, while the plaintiff states that, as he has purchased only one of the two houses mortgaged to first defendant's father, he is liable to contribute only one-half to the secured debt; and that this one-half is Rs. 100. This contention of the plaintiff is quite lawful, having the sanction of Section 82 of the Transfer of Property Act. From the evidence of the witness examined, it appears that out of the two houses by which the first defendant's debt is secured, the house No. 39, which is not now in dispute, is more valuable (worth between Rs. 400 and Rs. 500) than the house No. 31 which the plaintiff now seeks to redeem (worth between Rs. 250 and **[371]** Rs. 300); and yet the plaintiff offers to pay one-half of the mortgage debt, which I consider to be a very fair offer, and it is not shown how it is otherwise."

Defendant No. 1 preferred this appeal.

*Ganapati Ayyar*, for appellant.

*Ramanujachariar*, for respondent No. 1.

JUDGMENT.

1897 Nov. 29. — APPELLATE CIVIL. — 21 M. 369 = 8 M.L.J. 6.

The Judge is in error in supposing that the plaintiff having purchased a portion of the mortgaged property is at liberty to redeem that portion only without redeeming the rest. This is clear on principle, and is expressly enacted in the last clause of Section 60 of the Transfer of Property Act (see also *Timmappa* v. *Lakshmamma* (1)). Section 82 of the Transfer of Property Act on which the Judge relies does not permit the redemption of a mortgage piecemeal. It merely provides for contribution towards the mortgage debt rateably by each of several properties when they are owned by different mortgagors, or when, being all the property of one mortgagor, there are prior incumbrances on some of the properties (see also *Roghu Nath Pershad* v. *Harlal Sadhu* (2)).

We must therefore reverse the decree of the Lower Court and dismiss plaintiff's suit with costs throughout.

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**21 M. 371.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.*

MAIDEN (*Defendant No.* 3), *Appellant v.* JANAKIRAMAYYA AND OTHERS (*Plaintiff and Defendants Nos.* 1 *and* 2), *Respondents.** [3rd February, 1898.]

*Court Fees Act—Act VII of* 1870, *Sections* 7, 11—*Mesne profits left to be determined in execution of decree—Valuation of appeal against decree.*

In a suit for land with mesne profits a decree was passed for the plaintiff in which the amount of mesne profits was left to be determined in execution, the date from which they should be computed being the date of the suit. The defendant appealed against the decree on the ground that he should not have been decreed to pay either mesne profits or costs. In the valuation of the appeal **[372]** for the purposes of the Court Fees Act, nothing was included on account of the mesne profits :

*Held*, that no stamp duty was payable in respect of the mesne profits subsequent to the institution of the suit.

[R., 13 C.L.J. 132 (135) = 15 C.W.N. 506 = 8 Ind. Cas. 34 ; 13 C.W.N. 815.]

APPEAL against the decree of T. Ramachandra Rau, Subordinate Judge of Kistna, in original suit No. 4 of 1896.

This was a suit for land in which the plaintiff also asks for a decree for mesne profits for the years 1892-93 to 1894-95 and subsequent mesne profits up to the date of the delivery of possession to him. The Subordinate Judge passed a decree that the third defendant deliver possession to the plaintiff of the lands in question and pay mesne profits from the year 1895-96 until delivery of possession, the amount thereof to be determined in execution. He dismissed the rest of the plaintiff's claim for mesne profits, but decreed that the third defendant should pay to the plaintiff Rs. 779-10-0 as costs of the suit.

Defendant No. 3 preferred this appeal on the ground that he should not have been made liable for either mesne profits or costs, and, in the computation of the value of the appeal for the purpose of assessing the Court-fee, he did not include any sum on account of the mesne profits left undetermined.

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* Appeal No. 109 of 1897.

(1) 5 M. 385. (2) 18 C. 320.

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APPELLATE CIVIL.

21 M. 371.

*Etiraja Mudaliar*, for appellant.
*Pattabhirama Ayyar* and *Venkatarama Sarma*, for respondent No. 1.
*Sriramulu Sastri*, for respondent No. 2.
*Sivasami Ayyar*, for respondent No. 3.

JUDGMENT.

Having regard to *Ramakrishna Bhikaji* v. *Bhimabai* (1) we must hold that no stamp duty was payable in respect of the mesne profits, subsequent to the institution of the suit, *viz.*, for fasli 1305, which profits are comprised in the appeal.

The only contention urged with reference to the merits is that the Subordinate Judge's conclusion that the plaintiff's vendor had consented to the arrangement under which the third defendant held possession is against the weight of evidence. The sole evidence in support of the contention is that of the third defendant himself. We think the Subordinate Judge was right in declining to accept that evidence for the reasons given by him. We see no reason to interfere with the order made as to costs.

The appeal is dismissed with costs.

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## [373] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

*In Appeal No.* 66 *of* 1896:—

MAHABALA BHATTA AND ANOTHER (*Plaintiffs*), *Appellants v.* KUNHANNA BHATTA AND OTHERS (*Defendants*), *Respondents.*

*In Appeal No* 42 *of* 1897:—

MAHABALA BHATTA AND ANOTHER (*Plaintiffs*), *Appellants v.* SUBBANNA BHATTA AND OTHERS (*Defendants*), *Respondents.**

[20th, 24th and 25th January and 28th February, 1898.]

*Civil Proecdure Code—Act XIV of* 1882, *Section* 31—*Misjoinder—Tenants in common—Benami mortgage—Suit by some of the heirs of the real mortgagee—Evidence of benami—Limitation—Joinder of causes of action—Specific Relief Act—Act I of* 1877, *Section* 42.

In 1880 A and B jointly advanced moneys on the security of a usufructuary mortgage which was taken in the name of B. In 1884 A alone advanced moneys on the security of usufructuary mortgages which were likewise taken in the name of B. A died leaving three sons, of whom the plaintiffs were two. The plaintiffs having become divided from their brother now brought suits in 1894 against B and the mortgagors for a declaration of their rights to the mortgages and for possession of the documents and for rent of the land which had been collected by B. It appeared that there had been no denial of the plaintiffs' rights before 1889, that no rent had been collected for several years before suit, the mortgagors who had remained in possession as lessees after the execution of the mortgages having refused to attorn to B :

*Held*, (1) that the suits were not barred by Specific Relief Act, Section 42, for want of a prayer for possession :

(2) that the suits were not barred by limitation save as to the claim for rent ;

(3) that the suits were not bad for the non-joinder of the plaintiffs' brother ;

(4) that the transactions having been proved to be benami in character, the

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* Appeals Nos. 66 of 1896 and No. 42 of 1897.

(1) 15 B. 416.

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plaintiffs were entitled to declaration of their two-thirds right under the mortgages of 1884 and a like declaration as to half of the mortgage of 1880 ; and (5) that the plaintiffs were entitled to possession of the mortgage documents of 1884 and the other documents connected therewith but not the others.

[F., 30 M. 298 = 17 M.L.J. 224 ; R. 34 B. 13 (54) = 11 Bom. L.R. 273 = 3 Ind. Cas. 837 ; 28 M. 457 = 14 M.L.J. 401 ; 33 M 436 (438) = 5 Ind. Cas. 774 = 20 M.L.J. 344 = 7 M.L.T. 102 ; D. 23 M. 190.]

APPEALS against the decrees of U. Achutan Nayar, Acting Sub-ordinate Judge of South Canara, in original suits Nos. 28 and [374] 29 of 1894, in both of which the plaintiffs, were two of the sons of one Ramayya Bhatta, who died leaving also a third son Subbanna Bhatta who was not a party to the suit.

In the first case the defendants were a mortgagee and the two mortgagors of certain land. The plaint alleged that the mortgage, which was usufructuary and bore date the 25th of April 1884, was executed in the name of the first defendant as benamidar for the deceased Ramayya Bhatta, to secure repayment of Rs. 4,700, which had actually been advanced by him and not by the first defendant. It was further alleged that the mortgagors had rented the land from the mortgagee in his capacity as benamidar and that the plaintiffs were in possession by them as their tenants.

The plaint further alleged as follows :—

"After the death of plaintiffs' father, which took place in 1887, his brother-in-law, Kambar Subbanna Bhatta, got possession from the plaintiffs of the mortgage deed and other documents relating to the mortgaged property except the lease of 25th April 1884, and the receipt in connection therewith on pretence of settling the dispute between the plaintiffs on the one hand and their brother Subbanna Bhatta, since divided by a decree of Court on the other, regarding the division of their property, and clandestinely made over the documents to his employer, the first defendant, who since September 1889 has begun to assert his own right and to influence the second and third defendants not to pay rents to the plaintiffs."

The cause of action was stated to have arisen at the last-mentioned date, and in bar of limitation the plaintiffs alleged in their plaint as follows :—

"Plaintiffs sued defendants Nos. 1 to 3 and others on 28th October 1889 in original suit No. 41 of 1889 on this Court's file on the same cause of action, and though this suit was fully decreed by this Court, it was dismissed on 22nd February 1894 by the High Court on the technical ground of misjoinder in appeal suit Nos. 62 of 1892 and 72 and 73 of 1893. Plaintiffs are entitled to the benefit of Section 14 of the Limitation Act."

The prayers of the plaint were for a declaration that the mortgage and lease deeds were obtained by the plaintiffs' father benami in the name of the first defendant, that the first defendant be ordered to hand over to the plaintiffs those documents and all others relating to the property, and that the defendants be decreed to pay to the plaintiffs their share of arrears of rent with mesne [375] profits and interest. On these averments and on the pleas raised by the defendants, the following issues were framed :—

"(1) Whether the suit is barred by limitation ?

"(2) Whether the suit is opposed to Section 42 of the Specific Relief Act ?

"(3) Whether the registered usufructuary mortgage deed for Rs. 4,700, dated 25th April 1884, executed by defendants Nos. 2 and 3 as

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also the two leases, dated 25th April 1884 and 2nd October 1885, respectively, were really obtained by plaintiffs' father Ramayya Bhatta benami in the name of first defendant?

"(4) Whether the money, with which the mortgage was acquired belonged to Ramayya Bhatta?

"(5) Whether the plaintiffs are entitled to recover possession of the documents stated in the plaint?

"(6) Whether the rent has been satisfied in the manner alleged by the second and third defendants? and

"(7) Whether the plaintiffs can maintain the suit without the junction of Subbanna Bhatta as party?"

On the first issue the Subordinate Judge held that the plaintiffs were not entitled to the deduction of time claimed; the second issue he decided in favour of the plaintiffs; and the third, fourth and fifth against them. The finding on the sixth issue was that defendants Nos. 2 and 3 had paid rent to defendant No. 1 as alleged by them, and in the result he passed a decree dismissing the suit against which the plaintiffs preferred appeal No. 66 of 1896.

The second suit was brought against the same first defendant in respect of two similar mortgages taken in his name by the deceased Ramayya Bhatta on the 22nd of May 1880 and the 9th of June 1884 from defendant No. 10, who was the owner of the land and the chief defendant in this suit. The prayers in this suit were similar to those in the other. The material difference between the two suits was that the plaintiffs' father had advanced only Rs. 1,500 of the sum secured by the first of these mortgages. Similar issues were framed in this suit, which was likewise dismissed by the Subordinate Judge, and the plaintiffs preferred appeal No. 42 of 1897 against the decree.

The Subordinate Judge gave his reasons for finding that the misjoinder of the plaintiffs' brother was fatal to the maintenance of the suits in his judgment in the second suit where he said:—

**[376]** "The non-joinder in the suit of plaintiffs' brother Subbanna Bhatta is said by the defendants to be fatal to the maintenance of the suit, but the plaintiffs say that he is not a necessary party having obtained a decree for partition against them. I think he is a necessary party to the suit. All that he has got by the decree in the partition suit is a declaration of his right to a share of the plaint property as against the present plaintiffs. Whether the present plaintiffs succeed or fail in this suit, he has his right to sue. If the plaintiffs had made him a party to this suit, a second suit by him might be avoided. To original suit No. 41 of 1889, which was dismissed by the High Court on the ground of misjoinder, all the three brothers were plaintiffs. Then the present plaintiffs did not think that the decree for partition obtained by him did disentitle him to be joined as a co-plaintiff with them. If the decree in the partition suit has not severed their interests as regards the plaint property, which I doubt, then the non-joinder of Subbanna Bhatta is fatal to the suit (*Arunachala* v. *Vythialinga* (1), *Dwarka Nath Mitter* v. *Tara Prosunna Roy* (2), *Balkrishna Moreshwar Kunte* v. *The Municipality of Mahad* (3) and *Alagappa Chetti* v. *Vellian Chetti* (4))."

Mr. *R. A. Nelson* and *Narayana Rau*, for appellants.

*Pattabhirama Ayyar*, *Sundara Ayyar* and *Madhava Rau*, for respondents.

(1) 6 M. 27. (2) 17 C. 160. (3) 10 B. 32. (4) 18 M. 33.

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## JUDGMENT IN APPEAL NO. 66 OF 1896.

The material allegations for the plaintiffs were, briefly, that their father Ramayya Bhatta obtained benami in the first defendant's name the usufructuary mortgage deed bearing date the 25th April 1884 for Rs. 4,700 due to him by the second and third defendants, that these defendants were, however, permitted to retain possession of the lands (mortgaged by them) as lessees under the lease granted to them at the time the mortgage was executed, that, subsequent to the plaintiffs' father's death, which took place in 1887, the first defendant, about September 1889, denied the right of the plaintiffs under the mortgage, and that he fraudulently obtained possession of the mortgage instrument and certain other documents from Kambar Subbanna Bhatta, the plaintiffs' maternal uncle, to whom the documents had been entrusted pending certain disputes between [377] the plaintiffs and their brother Subbanna Bhatta respecting the division of their property.

The plaintiffs asked for a declaration that the mortgage belonged to their father and prayed for the recovery of the instrument of mortgage and the other documents referred to and for their share of certain rents collected from, or payable by, the second and third defendants under the lease.

The second and third defendants admitted the title set up by the plaintiffs. But the first defendant denied that he was a mere benamidar, and averred that having paid the money himself, he was the real mortgagee. He also contended that the suit was unsustainable, since the plaintiffs' brother Subbanna Bhatta had not joined in it, and since the plaintiffs, though out of possession of the lands under mortgage, had omitted to claim possession thereof as they were bound to do under Section 42 of the Specific Relief Act. The defendant further urged that the suit was barred by limitation.

The Subordinate Judge dismissed the suit having arrived at findings against the plaintiffs with reference to the questions of benami, non-joinder and limitation. But, in our opinion, the findings as to benami and non-joinder are wrong, and that as to limitation partly so. Having come to this conclusion, it will be convenient, first, to deal with the case on the merits and then to discuss the points of law raised.

The onus of showing that the transaction was benami was, no doubt, on the plaintiffs. But taking the evidence adduced in this suit and in the connected suits which were tried with it by consent of the parties, we have no doubt that the weight of evidence is decidedly in favour of the view that the case of the plaintiffs is true. The second and third defendants, as the plaintiffs' witnesses, fully support their case. No reason is suggested why these defendants should falsely espouse the plaintiffs' cause. Nor is there anything in the conduct of those defendants really detracting from their testimony. No doubt, after the plaintiffs' father's death, one year's rent was paid by the said defendants to the first defendant. That was, however, not in recognition of his title as the real mortgagee, for, as explained by them, it was not a voluntary payment.

Of the persons who attested the mortgage instrument, Narayana Kamti, who is to all appearance an independent witness, says that the document was executed for moneys belonging to the plaintiffs' [378] father and that the sum of Rs 624-8-0 recited in the document (Exhibit I) as paid at the time of the execution, was paid by the plaintiffs' father. The other attestors were called on behalf of the first defendant. Koragappa, one of

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them, said that he remembered nothing more about the matter than that one Akkari Banta got the mortgage executed for the first defendant. The evasive replies given by him in his cross-examination show that his evidence is worthless. Thimmappanna, who also stated that the first defendant was represented by Akkari Banta at the time of the execution of the document, is an equally unsatisfactory witness; and that appears to have been the opinion of the Subordinate Judge (Mr. Chandu Menon) before whom the witness gave his evidence, as the notes with reference to the witness's demeanour recorded in his deposition show. Ramayya Bhatta, another witness, whose evidence is similar to that given by Thimmappanna, is likewise untrustworthy. It is clear that there is considerable ill-feeling between the witness and at least one of the plaintiffs, and that the witness was among those who had caused the plaintiffs' mother to put forward an altogether untrue claim in the course of the partition suit instituted by the plaintiffs' brother Subbanna Bhatta, but which suit terminated in a compromise whereby a division was effected among the brothers. There is no doubt that the witness (Ramayya Bhatta) was present at the execution of the mortgage, since he wrote Exhibit A in this case which came into existence at the same time as the mortgage instrument. But he was then on friendly terms with the plaintiffs' father to whom he was related, and the witness's presence on the occasion and the part he took in the transaction, rather indicate that the party really interested in the transaction was the plaintiffs' father and not the first defendant. It is noteworthy that Akkari Banta referred to by the defendant's witnesses was not called.

Turning now to the important question of consideration for the mortgage, the Subordinate Judge himself says that the first defendant did not pay any portion of the amount. Though, as regards the comparatively small sum recited in the instrument as paid at the execution, a feeble attempt was made to prove that the first defendant paid it, yet, as regards the payment of the remaining large sum of Rs. 4,075, the first defendant failed to adduce any evidence whatever. Now, since it is the case of both the parties that the transaction was not a sham but that there was full **[379]** consideration for it, it is manifest that that consideration, not having come from the first defendant, must have come from some other person. That that person was the plaintiffs' father and none else is put beyond dispute by the testimony of Mahomed Beari, who, as one admittedly and most directly connected with the mortgage and the previous dealings which led to it, certainly knows the truth. According to his evidence the arrangement made about the bulk of the consideration in question was this:—At that time the second and third defendants owed Mahomed Beari a sum of Rs. 4,075; the latter owed to the plaintiffs' father over Rs. 5,000, and in consideration of the second and third defendants giving to the plaintiffs' father credit for Rs. 4,075 on account of the mortgage amount in question, Mahomed Beari gave up the claim he had against those defendants for the Rs. 4,075, the plaintiffs' father on his part giving up to that extent his claim against Mahomed Beari and executing a document for the remainder. If this were not the arrangement really made, and if, as alleged on behalf of the first defendant, the sum of Rs. 4,075 was paid by him to Kambar Subbanna Bhatta, how is it that not a scrap of evidence about it is forthcoming? and why has neither the first defendant nor Subbanna Bhatta ventured to go into the box to speak to such payment? So far as Subbanna Bhatta is concerned it is clear he would not go into the box, because he would be

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confronted with Exhibit A in Appeal No. 42 of 1896, which completely negatives the truth of the story set up on behalf of the first defendant. We have no hesitation in saying that this exhibit is a genuine document. The two persons, whose attestations it bears, prove that it was written by Subbanna Bhatta himself throughout. That evidence is absolutely uncontradicted, and a comparison of the writing of the document with the writing of the unquestionable documents produced for comparison leaves no doubt that the exhibit in question was written by Subbanna Bhatta. We cannot, therefore, agree with the Subordinate Judge in holding that it is not genuine; and, as already observed, it disproves the defence and establishes the plaintiffs' case inasmuch as it is therein admitted in unequivocal terms that the mortgage in question was obtained benami in the name of the first defendant by the plaintiffs' father for money belonging to him. With such practically conclusive proof in favour of the plaintiffs it is scarcely necessary to refer to other less important circumstances which support our [380] view and which are disclosed by some of the documents executed with reference to the transactions which preceded the mortgage in question. We would only add that the plaintiffs' case is not rendered improbable by the fact that first defendant and the plaintiffs' father were of different castes, since Subbanna Bhatta, through whom his brother-in-law, the plaintiffs' father, carried on his money dealings, was, at the execution of the mortgage and before and afterwards, the first defendant's shanbhogue or accountant, and it was not therefore unlikely that the first defendant was trusted in consequence of such connection between him and Subbanna Bhatta. As to the possession by the first defendant of the mortgage instrument and the other documents relating thereto, several witnesses on behalf of the plaintiffs prove that, shortly after the death of the latter's father owing to disputes between the brothers, those documents were handed over to Subbanna Bhatta for safe custody. He has not come forward to contradict this evidence; and he having subsequently become hostile to his nephews, it is to be inferred that he handed over the documents in question to his employer, the first defendant, and induced the latter to claim the mortgage right falsely as his own. We must, therefore, find that the first defendant was only a benamidar and that the real mortgagee was the plaintiffs' father.

We now pass to the points of law urged.

First, as to the objection of non-joinder which was strongly pressed. Now the present action is one founded on tort; and as the plaintiffs and their brother Subbanna Bhatta had become divided, their interest under the mortgage is not joint but separate being that of tenants in common. That tenants in common may, in such an action as the present, at their option either join or sever, seems to be clear law (Dicey on Parties, rule 80, paragraph 2). No doubt, according to the common law practice, when one tenant in common sued on a tort without joining other tenants in common as plaintiffs, objection on the score of non-joinder was allowed to be taken by way of a plea in abatement. If, however, such plea was not raised, he was entitled to proceed in the action. But then, if the subject-matter of the claim was divisible, he could get his share and no more. Compare the opinion of the majority in *Deo d. Hellyer* v. *King* (1), though the dissenting Judge, Platt, B., went [381] further in that case and held that a tenant in common is owner of the whole estate in common with his co-tenants, and therefore as soon as he has proved his right to the possession in common

(1) 6 Exch. Rep. 791 (795).

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with others and that the defendant having no such right is a wrong-doer, as against such wrong-doer he, the plaintiff, is entitled to recover possession of the whole. However this may be, there is no doubt that in the case of property indivisible one co-owner alone can recover it from a person that holds unlawful possession thereof. In *Broadbent* v. *Ledward* (1) a member of a club, who was as such proprietor of certain pictures jointly with other members who were not made co-plaintiffs in the action, recovered the pictures from one who had no right at all. Lord Denman, C.J., observed :—" It is always unpleasant to defeat justice by adherence to "technical and arbitrary rules. In suing upon contracts the rule has "certainly been that all the contracting parties must be joined as co-plaint-"iffs, and advantage may be taken of the non-joinder without a plea in "abatement ; but, as no express authority has been shown by Mr. Wight-"man for the application of this rule to the action of detinue, we shall "decide against the defendant. If any inconvenient consequence arises "to the defendant from detaining the property of joint owners, it might "have been avoided by giving it up to any one of them." Patteson, J., said :—" The rule as to the consequence of the non-joinder of parties as "plaintiffs in actions founded upon contract is not satisfactory in "principle, and ought not to be extended." Williams and Coleridge, JJ., concurred. The principle of these decisions is still applicable, and it is clear that one tenant in common can sue in tort without joining others—see *Roberts* v. *Holland* (2) cited for the plaintiffs.

It was contended, however, that the equity practice is different and ought to be followed in this country. It is no doubt true that the general rule in Chancery is that all persons interested should be parties, and that under the old practice it was open to a defendant to take objection on the ground of non-joinder of a tenant in common by way of demurrer (*Brooks* v. *Burt* (3) ). But that rule is not, since the abolition of demurrers for want of parties, too inflexible to admit of qualifications. In *Wright* v. *Robotham* (4) **[382]** it was no doubt held by the Court of Appeal that one of two persons who had equal right to certain title-deeds could not recover them without the concurrence of the other. But there the defendant's possession was not unlawful, as Cotton and Lindley, L., JJ., took care to point out, implying thereby that their decision might have been different had the possession of the defendant been unlawful. Even in such a case the Court directed the deeds to be deposited in Court, the plaintiffs having liberty to inspect and make copies of them. And in *Foster* v. *Crabb* (5) cited in *Wright* v. *Robotham* (4), the decision of the Court of Common Pleas rests on the ground that the plaintiff did not show a better right than the defendant to the possession of the deed, the title to which was ambulatory between those who have an interest in and may have occasion to use it, and each is entitled to keep the deed from the other so long as he actually retains it in his custody and control but no longer. We see therefore that either at law or in equity, since the passing of the new rules of the Supreme Court whereby pleas in abatement and demurrer for want of parties were abolished, the remedy available when there is a defect of parties is, as pointed out by Jessel, M.R., in *Werderman* v. *Societe Generale d'Electricite* (6), that provided by Order XVI, Rule 13, which empowers Courts to strike out or add parties so that the person who objects because

(1) 11 A. & E. 209, (212-13).
(2) (1893) 1 Q. B. 665.
(3) 1 Beav. 106.
(4) 33 Ch. D. 106.
(5) 21 L.J.C.P. 189.
(6) 19 Ch. D. 246 (251).

of want of parties has nothing to do but to take out a summons asking that certain parties be added as necessary parties. It is necessary to observe that the above case was decided when the order corresponding to Section 31 of the present Code of Civil Procedure did not contain the word "non-joinder." Notwithstanding the absence of these words the Court treated the order as comprehending cases of "non-joinder" as well as "mis-joinder." Turning now to Section 31 of our Code which corresponds to Order XVI, Rule 13, as it stood at the time of the decision in *Werderman* v. *Societe Generale d'Electricite* (1), and before it was amended by the addition of the word "non-joinder," we think a similar construction ought to be put on it and the section must be held to amount to a direction to the Court not to dismiss a suit on the ground of non-joinder. The reason for such a provision is obvious. The rule as to parties is for the purposes of justice and the Court has ample powers under Section 32, Code of Civil Procedure, to [383] add parties whenever they ought to have been made parties or whenever without them the Court could not deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

In the present case what the plaintiffs are entitled to in point of law is a declaration of their title to two-thirds of the mortgage-debt. Their right is separate from that of Subbanna Bhatta who is entitled to the remaining one-third though the debt is the same. In these circumstances, Subbanna Bhatta is not an indispensable party whom the Court will insist upon being brought before it, for he will not be directly affected by any decree in this suit; nor, in our opinion, is he a necessary party, that is, though not likely to be affected directly by the decree, he is yet one who, as interested in the actual controversy, should be before the Court to enable it to adjudicate fully and finally as between the parties already before it. If he is made a co-plaintiff, no doubt, future litigation in the matter can be altogether prevented. But that can only be if he consents to be a co-plaintiff, which does not appear to be the case. If, however, he be made a co-defendant, it is difficult to see how that could stop further litigation. If the plaintiffs succeeded they could get relief only in respect of their shares, and Subbanna Bhatta would be at liberty to sue in respect of his share. But if the plaintiff fail upon the question of benami, it is doubtful whether the decision would be *res judicata* between the first defendant and the co-defendant Subbana Bhatta (see *Nabin Chandra Mazumdar* v. *Mukta Sundari Debi* (2) ; but *Contra Chandu* v. *Kunhamed* (3) ). Even were this view wrong the first defendant might have moved the Court, if Subbanna Bhatta consented to be a co-plaintiff, to add him as such, and, if he did not, to make him a defendant. The omission to adopt this course could not for a moment be held to warrant dismissal of the suit which has been fully tried and dealt with on the merits. Even at the present stage of the case we should and would have directed Subbanna Bhatta to be made a party if that would really serve the ends of justice. But, as shown already, we do not think it necessary that he should be brought on the record. He was himself one of the witnesses in the case and nothing was elicited from him to show that he raised any question affecting in the remotest degree the right of the plaintiffs [384] to obtain the reliefs claimed by them. The contention that the suit fails on the ground of non-joinder of Subbanna Bhatta must, therefore, be overruled.

(1) 19 Ch. D. 246 (251). (2) 7 B.L.R. Appx. 38. (3) 14 M. 324.

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The objection under Section 42 of the Specific Relief Act also fails, as the evidence leaves no doubt that the second and third defendants have for several years before the suit withheld payment of rent and refused to attorn to the first defendant who cannot thus be taken to be in possession through them.

As to limitation, the claim as to declaration is not barred, as there is no evidence to show that there was any denial of the title of the plaintiffs before September 1889. Nor has that for the documents been shown to be out of time. But the claim for the rents received by the first defendant is barred.

As to the second and third defendants, their liability for rent under the lease cannot of course be gone into in this suit.

In reversal of the decree of the Subordinate Judge, there will be a decree for the plaintiffs declaring their two-thirds right under the mortgage of the 25th April 1884 and the leases, dated 25th April 1884 and 22nd October 1885, and for possession of those documents and those mentioned in the schedule annexed to the plaint. The rest of the claim is dismissed. The first defendant will pay the plaintiffs' costs throughout. The other defendants will bear their own.

## JUDGMENT IN APPEAL NO. 42 OF 1897.

The real question in this case is as to what interest, if any, the plaintiffs' father possessed under the usufructuary mortgages of the 22nd May 1880 and 9th June 1884 executed to his brother-in-law K. Subbanna Bhatta, the first defendant, by Mahomed Beari, the tenth defendant. Exhibit A in the present suit which, for reasons given in our judgment in Appeal No. 66 of 1896, we find to be a genuine document, is decisive of the matter, and according to it half out of the first-named mortgage belonged to plaintiffs' father and out of Rs. 1,738-4-0, the amount of the second mortgage, Rs. 313-12-0 alone belonged to K. Subbanna and the remainder belonged to the plaintiffs' father, the mortgages and the leases connected therewith being taken in the name of the former, for the benefit of the latter also. In reversal of the Lower Court's decree there will be a decree declaring that the plaintiffs are entitled to two-thirds of half of the mortgage under date the 22nd May 1880, and to two-thirds of the mortgage under date the 9th June 1884, after **[385]** deduction of the sum of Rs. 313-12-0 from the mortgage amount and the same with regard to the leases connected therewith.

The plaintiffs are not entitled to the custody of the documents in preference to the first defendant and those claiming through him and who also possess an interest under those documents.

The question of the tenth defendant's liability for rent cannot be gone into in this suit.

The first defendant will pay the plaintiffs' costs throughout. The other parties will bear their own.

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## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

ARAVAMUDU AYYANGAR (*Plaintiff and Petitioner*), *Appellant v.* SAMIYAPPA NADAN (*Defendant No. 5 and Counter-Petitioner*), *Respondent.** [7th and 9th December, 1897, and 4th April, 1898.]

*Limitation—Order to pay money—Money paid after due date.*

When an order has been made for the payment of money in a suit on a certain date and the Court was closed on that date, a payment made on the following day would be a good payment for the purposes of the order.

[F., 3 C.L.J. 339 = 10 C.W.N. 535; 14 Ind. Cas. 579 = 23 M.L.J. 221 (222) = 12 M.L.T. 169; R., 35 B 35 (36) = 12 Bom. L.R. 818; 13 C.L.J. 467 = 10 Ind. Cas. 51 (53); 16 C.W.N. 721 (723); 7 N.L.R. 176 (178).]

APPEAL against the order of B. Macleod, Acting District Judge of Tinnevelly, in appeal suit No. 78 of 1895, reversing the decree of S. Mahadeva Sastri, Acting District Munsif of Satur, on miscellaneous petition No. 17 of 1895.

The petitioner was the plaintiff in original suit No. 669 of 1893. The facts of the case were stated by the District Judge as follows:—

"According to the terms of the decree in original suit No. 669 of 1893, the second instalment became payable on 6th January 1895. That day was a holiday and the Court re-opened after the Christmas holidays only on 8th January 1895. The judgment-debtor put in a memorandum asking for a chellan to enable him to deposit the money in the Taluk treasury on 8th January 1895. [386] No chellan appears to have been granted to him on that day. Again on the 9th, the pleader for the decree-holder put in a receipt for the sum which the judgment-debtor was to have paid in Court and was ready to receive the money. The judgment-debtor did not put in his appearance that day, and the Court rejected the memorandum for chellan put in by the judgment-debtor and passed an order on the receipt put in by the decree-holder recording it, as no money was paid that day on the 10th January; the judgment-debtor again offered to deposit the money in the Taluk treasury and applied for a chellan through his pleader Subramania Pillai. He also applied by a petition on the same day asking the Court to have the money deposited on that day as having been paid on the 8th January 1895.

"The petition put in on 10th January 1895 was returned on 11th January 1895 for quoting the section of the Civil Procedure Code under which it was presented. The petition was presented again on the same day with the remark that as there was no special provision, the section had not been quoted. That same day the Court ordered that 'the money has been deposited in time, no further order is necessary' without giving any notice to the decree-holder and behind his back. The decree-holder applied on 12th January 1895 to have the aforesaid order set aside and to have the deposit, made on 10th January 1895, declared as made beyond time. Notice was given of this application for review and the judgment-debtor put in his counter-petition. The counter-petitioner states that he was all along ready to deposit the money in Court since 8th January 1895, and that as no chellan was given him, he was not able to deposit the money on 8th January 1895, that though he was all along waiting in Court, for

* Appeal against Appellate Order No. 39 of 1897.

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the chellan on 9th January 1895, he was called just when he had left to the river and his petition was rejected. His payment of money on 10th January 1895 must, therefore, be deemed to have been made in time and that there are no grounds to review the order.

"The fact of payment of money only on the 10th January 1895 is admitted. It is further admitted that the Court made the order on 11th January 1895 without notice to the decree-holder. No explanation why the counter-petitioner did not insist for a chellan on 8th January 1895, or why he did not pay the money to the pleader for decree-holder who seems to have been all along ready to receive the money before the Court as appears by his [387] receipt. I don't believe the Court has power to extend the time fixed by the decree. The decree makes the payment on 6th January 1895 peremptory. As the Court was closed for the Christmas holidays on 5th January 1895 then and opened only on 8th January 1895, the only course open to judgment-debtor was to have anyhow paid the money on 8th January 1895 if the Court was open. It is not said that the Court was not open on 8th January 1895. It is said that he was asked to come on 9th January 1895 for depositing the money. No deposit was made on the 8th January or on the day following. The payment on 10th January cannot, under circumstances, be taken to have been made on the re-opening day, *i.e.*, 8th January 1895."

The District Munsif set aside the order of the 11th January 1895, but the District Judge on appeal reversed his decision holding that the defendant who appealed was not responsible for the delay and that the order referred to should be maintained.

The plaintiff preferred this appeal.

*Desikachariar*, for appellant.

*V. Krishnasami Ayyar*, for respondent.

## JUDGMENT.

The last day for payment into Court would admittedly have been the 6th January 1895 but for the fact that on that day the Court was closed. The first question is whether the fact that the Court was then closed entitled the fifth defendant (respondent) to pay the money on the first day thereafter that the Court was open, *i.e.*, on the 8th January. We think he was so entitled. The case *Dabee Rawoot* v. *Heeramun Muhatoon* (1) cited by the respondent is a direct authority in favour of this view. The principle on which the rule depends is thus stated in *Shooshee Bhusan Rudro* v. *Gobind Chunder Roy* (2) :—"Although the parties themselves cannot "extend the time for doing an act in Court, yet if the delay is caused not "by any act of their own, but by some act of the Court itself—such as "the fact of the Court being closed—they are entitled to do the act on "the first opening day."

We must, therefore, hold that if the money was produced in Court on the 8th January, but was not actually deposited, not from any default of the fifth defendant, but owing to an act of the Court or of its officers the requirements of the decree were satisfied and the plaintiff would not be entitled to claim the sum [388] relinquished. If, on the other hand, it were not so produced, or if its non-payment into the treasury was due to any default of the fifth defendant, the requirements of the decree were not satisfied and the plaintiff is entitled to the sum relinquished.

(1) 8 W.R. C.R. 223.

(2) 18 C. 231.

The District Judge has not given a definite finding on the issue above stated. We must ask him to submit a finding thereon within a month from the date of the receipt of this order. Fresh evidence on both sides may, if necessary, be taken.

Seven days will be allowed for filing objections after the finding has been posted up in this Court.

[In compliance with the above order the District Judge submitted his finding which was to the effect that the defendant did not produce Rs. 750 in Court on the 8th of January 1895, and that there had been no default on the part of the officials in entering into a credit to him. The appeal having come on for hearing on the 4th of April 1898 his findings were accepted and the order of the District Court was reversed and that of the District Munsif restored.

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**21 M. 388 = 8 M.L.J. 48.**

## APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.*

MANIKKAM (*Petitioner*), *Appellant v.* TATAYYA AND OTHERS (*Counter-petitoners*), *Respondents.**

[29th November, 1897, and 13th January and 15th July, 1898.]

*Civil Procedure Code—Act XIV of* 1882, *Section* 232—*Transfer of decree—Benami transfer.*

If a decree is transferred to one as benamidar for the actual purchaser, the latter is entitled to execute the decree and his right course is to, apply under Civil Procedure Code, Section 232.

[R., 25 M. 545 = 12 M.L.J. 280 ; 17 M.L.J. 391 = 2 M.L.T. 197 ; 10 O.C. 263.]

APPEAL against the order of G. T. Mackenzie, District Judge of Godavari, in appeal suit No. 331 of 1895, affirming the decision of S. Pereira, District Munsif of Ellore, in execution petition No. 369 of 1895, in the matter of original suit No. 242 of 1892.

This was an application by Manda Manikkam for the execution of the decree in original suit No. 242 of 1892 on the file of the **[389]** District Munsif of Ellore. Of the respondents to the petition the first, second third and fourth were the defendants and judgment-debtors. As to the fifth the petition alleged that he and the applicant carried on business jointly and out of their joint funds purchased the interest of the decree-holder, the transfer being taken benami in the name of Patti Subrayadu since deceased who had no interest in the transaction. The prayer of the petition was as follows :—

"Petitioner, therefore, prays that, under Sections 232 and 248 of "the Civil Procedure Code, a notice may first be issued to the original "plaintiff and to the counter-petitioners and to Ponnamma, the mother of "Sriramamurti, minor son of late Patti Subrayadu, that the petitioner may "be taken on as the transferee-plaintiff, and that afterwards the amount "may be recovered for the petitioner by sale of the moveable properties "belonging to the counter-petitioners situated in Ellore which will be "pointed out by the petitioner or by any person on the petitioner's be-"half. Subrayadu already made an application, along with which he filed. "copy of the decree."

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* Appeal against Appellate Order No. 26 of 1897.

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The District Munsif dismissed the application, and his decision was affirmed by the District Judge, who expressed the view that Civil Procedure Code, Section 232, does not contemplate the execution of a decree at the instance of one in the position of the applicant; and that, even if the application could legally be granted, it was a matter of discretion with the Court, and under the circumstance the applicant was not entitled to the relief sought by him.

The petitioner preferred this appeal.

*V. Krishnasami Ayyar* and *Kuppusami Ayyar*, for appellant.

*Sivasami Ayyar* and *Gopalasami Ayyangar*, for respondents.

## JUDGMENT.

SUBRAMANIA AYYAR, J.—One Lakmisetti Subrayudu obtained a decree for money in original suit No. 242 of 1892. Shortly after, one Patti Subrayadu (deceased) alleging himself to be the transferee of the decree applied to be permitted to execute the decree and he was allowed by the Court to do so. The appellant, Manda Manikkam, alleging that he and his brother, the fifth respondent, are the real transferees and that Patti Subrayadu was but a benamidar for them, has now applied to execute the decree.

As I understand the order of the District Judge, he holds that, even if the appellant is one of the real transferees, Section 232, [390] Civil Procedure Code, does not admit of such transferee applying under the section, and further, supposing that an application for the execution of the decree by such transferee is entertainable under the section, the Courts should, in the exercise of their discretion, decline to grant the application.

But it is impossible to doubt that, notwithstanding the form of the transaction, it is the person beneficially entitled under the transaction, that is the transferee of the decree. The right of such transferee to apply under Section 232 has been admitted. *Abdul Kureem* v. *Chukhun* (1), *Balkishen Das* v. *Bedmati Koer* (2), *Arasappan* v. *Pulugasari* (3), and *Sethurayar* v. *Shunmugam Pillai* (4).

It is true that in the present instance the alleged nominal transferee applied and was allowed to execute the decree on the footing that he was the real transferee. If, however, he was not in fact the real transferee, the proceedings taken by him in execution, though binding upon the real transferee so far as they go, could not estop the latter from claiming to conduct the further execution of the decree himself. And so far as this point is concerned, the fact that the real transferee comes forward to execute the decree after the nominal transferee has been allowed to execute it, is of no consequence. Nor does the circumstance that the alleged nominal transferee denies that he is a nominal transferee affect the right of the person claiming to be the real transferee to have the point tried. Under the law, as it now stands, it may be tried in the execution proceedings or in a separate suit according as the Court considers the one or the other the more convenient course to be adopted in the particular case. It is scarcely necessary to point out that, when there is a contest, the question whether the party claiming to be the real transferee is or is not such, is a question as to whether he is a representative of the party to the suit in whose favour the decree was given and therefore falls under the last paragraph of Section 244 of the Civil Procedure Code (*Badri*

(1) 5 C L R. 253. (2) 20 C. 388.
(3) Appeal against Appellate Order No. 27 of 1894 (unreported).
(4) 21 M. 353.

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*Narain* v *Jai Kishen Das* (1), *Gour Mohan Golui* v. *Dino Nath Karmakar* (2). The District Judge was therefore wrong, in my view, in holding that the appellant was not entitled to apply under Section 232 of the Code. He was also wrong in considering that, even if the [391] application was entertainable under the section, because the transfer was benami, the Court should, therefore, refuse to allow the real transferee to execute it. I would therefore call upon the District Judge to submit a finding upon the question whether Patti Subrayadu was the real transferee or the appellant and his brother are the real transferees. The finding will be upon the evidence on record unless the Judge is satisfied that the appellant had not sufficient opportunity of adducing evidence on the point as alleged by him. If the Judge is so satisfied fresh evidence may be received on either side.

The finding is to be submitted within one month from the date of the receipt of this order, and seven days will be allowed for filing objections after the finding has been posted up in this Court.

SHEPHARD, J.—We reserved judgment in the case only because some doubt was entertained as to whether the claim of the appellant could legally be dealt with on a petition. I agree with my learned colleague in holding that the appellant may apply under Section 232 of the Civil Procedure Code and also in the proposed order.

[In compliance with the above order the District Judge returned his finding which was to the effect that Patti Subrayadu was the real transferee. In the result the case having come on for hearing on the 15th of July 1898 the Court delivered judgment accepting the finding and dismissing the appeal with costs.]

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**21 M. 391.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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GURUMURTI (*Plaintiff*), *Appellant* v. SIVAYYA AND ANOTHER (*Defendants*), *Respondents*.* [2nd February, 1897.]

*Promissory note to a minor's guardian—Minor's suit by another next friend—Note not endorsed.*

An infant sued by his next friend to recover the balance due on a promissory note alleged to have been made and delivered on account of his estate to his mother and guardian who had not endorsed the note:

*Held*, that the suit was maintainable in the absence of an endorsement.

[R., 28 M. 205 = 15 M.L.J. 249 ; 30 M. 88 = 16 M.L.J. 508 = 1 M.L.T. 377 ]

[392] APPEAL against the decree of W. G. Underwood, District Judge of Cuddapah, in original suit No. 5 of 1894.

The plaintiff sued by his guardian and next friend to recover from the defendant the sum of Rs. 3,792, and it was alleged in the plaint that on the 3rd July 1891 the father, since deceased, of defendant No. 1, made and delivered to Subbamma, the plaintiff's guardian, on account of the plaintiff's estate a promissory note payable on demand for Rs. 4,066 for value received, that, as the result of subsequent transactions, the maker became entitled to credit for the sum of Rs. 1,257, and that no further payment

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* Appeal No. 21 of 1896.

(1) 16 A. 483.

(2) 2 C.W.N. p. 76.

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was made towards the note. The present suit was brought to recover the balance of the amount of the note together with interest. The cause of action was alleged to have arisen on the date of the note which was dated 3rd July 1891. The defendants were respectively the undivided son and brother of the maker, who, it was alleged, had made the note for the benefit of the family in his capacity as managing member. The issues which were framed in the suit raised the questions whether the debt was contracted for joint family purposes and whether it was binding on defendant No. 2. In the course of the trial it was objected on behalf of defendant No. 2, that the suit was not maintainable for the reason that Subbamma had not endorsed the note. The District Judge held this objection was well founded and was fatal to the suit, which he accordingly dismissed.

The plaintiff preferred this appeal.

*Ramachandra Rau Saheb*, for appellant.

*Venkatasubbaramayya*, for respondent No. 2.

## JUDGMENT.

We do not clearly understand the grounds on which the District Judge has dismissed this suit. The second defendant's Vakil, in the course of the trial, raised an objection that the promissory note was not endorsed to plaintiff by Subbamma, the payee. We are unable to agree with the District Judge that the objection was a fatal one. The allegation in the plaint is that the promissory note was executed in favour of Subbamma on account of plaintiff's estate. This was not traversed in the defendant's written statements, nor was any issue framed in regard to it. Even if it had been traversed, it was open to the plaintiff to have proved the truth of the allegation, and, if he had succeeded, he would have been entitled to a decree as the real owner of the amount due under the note.

**[393]** We must, therefore, allow the appeal with costs, set aside the decree of the District Judge, and remand the suit for disposal in accordance with law.

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**21 M. 393.**

## APPELLATE CIVIL.

*Before Mr. Justice Benson and Mr. Justice Boddam.*

AYYAVAYYAR (*Petitioner-Defendant No.* 2), *Appellant v.* VIRASAMI MUDALI (*Counter-petitioner-Plaintiff*), *Respondent.**
[22nd and 27th October, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Section* 266—*Wages of private servant—Attachment.*

The wages of a private servant cannot be attached in whole or in part before they become due and a debt exists

[R., 31 A. 304=6 A.L.J. 227; 14 C.L.J. 127=16 C.W.N. 14 (17)=11 Ind. Cas. 422.]

APPEAL against the decree of E. J. Sewell, District Judge of North Arcot, in appeal suit No. 92 of 1896, confirming the order of W. Gopala Chari, District Munsif of Arni, in miscellaneous petition No. 25 of 1896 in the matter of original suit No. 284 of 1883.

* Appeal against Appellate Order No. 63 of 1897.

The decree-holder applied for and obtained an order for the attachment in execution of his decree of ten rupees a month out of the wages of defendant No. 2, who was a peon in the service of the Jaghirdar of Arni. The defendant No. 2, by his petition, now objected to the attachment, but his objections were overruled and the attachment was maintained. The District Munsif delivered judgment as follows :—

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"The judgment-debtor's objections are not good. It is said that the "salary cannot be attached until it falls due, but as observed in *Tejram* "*Jagrupaji* v. *Kusaji Gangji* (1), the salary is attached as defendant's "property. It may not be a thing *in esse* but it is a thing *in potentia.* "As to the contention that defendant is not a public servant, it does not "help defendant ; for, it is only in case of salary of a public servant that a "moiety is **[394]** exempted from attachment. The defendant is not a "domestic servant, and Clause (*j*) does not apply. The case cited by "defendant *Syud Tuffazal Hossein Khan* v. *Raghunath Prasad* (2), does "not apply."

The District Munsif accordingly made an order in favour of the decree-holder and this order was affirmed on appeal by the District Judge.

Defendant No. 2 preferred this appeal.

*Ponnusami Ayyangar*, for appellant.

*Ranga Ramanujachariar*, for respondent.

## JUDGMENT.

In this case Rs. 10 a month of the salary or wages of a peon in the Arni Jaghir have been attached in advance in execution of a decree.

The District Judge has confirmed the order of the District Munsif and this is an appeal from that decision.

We are of opinion that the decision is wrong and that, under Section 266, Civil Procedure Code, no salary can be attached until it becomes due and a debt exists. There is nothing in Section 266 of the Civil Procedure Code to alter the pre-existing law in this respect.

It is suggested that, inasmuch as by the proviso to Section 266, the salary of public officers and of servants of a Railway Company is in part only made not liable to attachment, and the wages of labourers and domestic servants are entirely made not liable to attachment, it must be assumed that the wages of others who are not included in the proviso are liable to attachment before they have become due and are debts. This we think, is a fallacy. There is nothing whatever in the section to indicate that the salary of public officers or of railway servants can be attached before it is due. That can only be done by virtue of the special provision in Section 268. The whole meaning of the proviso to Section 266 is made clear by the explanation. Read with that, the proviso (beginning at (*g*) and going to (*m*)) means that though (*g*) stipends and gratuities, (*h*) salaries of public officers and railway servants, (*i*) pay and allowances of persons to whom the Native Articles of War apply, (*j*) wages of labourers and domestic servants, (*k*) contingent rights and interests, (*l*) rights to future maintenance, (*m*) any allowance, &c.,—all, in fact, at some time **[395]** or another become existing debts (*i.e.*, when payable), they are even then not liable to attachment. It nowhere says that the salary of a public officer or a railway servant is liable to attachment in advance, nor in our opinion was anything of the kind intended. The Munsif's judgment is entirely based upon a misapprehension of the decision in the case he refers

(1) 7 B.H.C.R. (A C.J.) 110. (2) 7 B L.R. 186.

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to *Tejram Jagrupaji* v. *Kusaji Gangji* (1). That case does not decide that the whole of a peon's wages may be attached in advance, when it is what he calls a thing *in potentia*. What the case decides is that the whole of a peon's wages may be attached as it becomes due and it decides no more. We have been unable to find any case in which salary or wages have been attached in advance of their becoming due, except under Section 268, Civil Procedure Code, which does not apply to this case but only to the case of the salaries of a public officer or a railway servant. The petitioner is not a public officer or a railway servant but a private peon.

We are therefore of opinion that the appeal should be allowed and the attachment set aside with costs throughout.

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21 M. 395.

## APPELLATE CIVIL.

*Before Mr. Justice Benson and Mr. Justice Boddam.*

RAMANADAN CHETTI (*Plaintiff*), *Appellant* v. NAGOODA MARACAYAR (*Defendant*), *Respondent*.*
[20th and 21st October and 2nd November, 1897.]

*Merchant Shipping Act Amendment Act*—25 & 26 *Vict*., C. 63, *Section* 3—*Transfer of a ship—Equitable title—Destruction after agreement for sale.*

The defendant agreed to purchase a ship from the plaintiff, but the sale was not completed in the manner prescribed by the Merchant Shipping Acts. The ship was delivered to the defendant in pursuance of the agreement and subsequently foundered in port owing to accidental causes. The plaintiff sued to recover the balance of the purchase money.

*Held*, that the plaintiff was not entitled to recover.

[Diss., 29 M. 526=1 M.L.T. 407.]

APPEAL against the decree of P. Narayanasami Ayyar, Subordinate Judge of Negapatam, in original suit No. 24 of 1895.

The plaintiff sued to recover from the defendant the sum of Rs. 5,000, together with interest thereon, from the 2nd August [396] 1893 to 22nd August 1895. The sum claimed was part of the sum of Rs. 8,250 for which the defendant agreed to purchase a ship from the plaintiff under the agreement recited in the judgment of the High Court. The ship was handed over to the defendant's agent on the 2nd of August 1893 and was taken to Porto Novo where it sank, no legal transfer of the ship having been effected. The findings of the Subordinate Judge were to the effect that the sale had been left uncompleted owing to the default of the plaintiff, that the foundering of the ship was not due to any default of the defendant, that the plaintiff had not committed fraud by failing to disclose to the defendant any serious defect in the ship, that the property in the ship had not passed to the defendant when the accident occurred, and that the loss occasioned thereby should not fall on him. The further facts of the case appear sufficiently for the purposes of this report from the following judgment of the High Court.

The Subordinate Judge dismissed this suit and the plaintiff preferred this appeal.

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* Appeal No. 23 of 1897.

(1) 7 B. H. C. R. (A. C. J.) 110.

*Sankaran Nayar* and *Sundara Ayyar*, for appellant.
Mr. *S. H. Bilgrami*, for respondent.

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JUDGMENT.

The plaintiff sued the defendant for Rs. 6,233-4-0, consisting of Rs. 5,000, balance of the sale amount of a ship, and Rs. 1,233-4-0, interest thereon at 12 per cent. per annum from the 2nd August 1893, claimed as damages.

The plaintiff's case was that the defendant entered into a written agreement with him (through his agent) on the 21st July 1893 to purchase a ship belonging to the plaintiff for Rs. 8,250; that, when Rs. 3,250 of the purchase money had been paid in pursuance of the agreement, the defendant wrongfully obtained possession of the ship without the agreement being fully completed and carried it away and he claimed the balance and damages.

The facts are that on the 20th July 1893, a written agreement was signed by the defendant to the plaintiff's agent, whereby the price of the vessel was settled at Rs. 8,250 and it was agreed that the defendant having paid Rs. 701 of the purchase money should pay Rs.2,549, more in fifteen days and the agreement continues in these words:—"which being done you "shall complete and give in my favour a deed of sale of the said ship for the "above-mentioned sum of Rs. 8,250, and a pass for the ship. No sooner "that is done than I shall execute to you also the discount bond for [397] "Rs. 5,000 on the security of the said ship, &." On the 30th July, the defendant paid the Rs. 2,549 and gave the plaintiff's agent a draft sale-deed and power to register the ship in his name, and the plaintiff's agent gave him a signed document containing an acknowledgment of the receipt of that amount and then continuing "as you have delivered "to me this day the sale-deed and the power to transfer to your name "having written out the same I shall forward it (the sale-deed) to my "principal at Devakottah, obtain his signature thereto, and get in my name "the power to transfer the pass of the ship. I shall come to Porto Novo, "hand over the said sale-deed and execute in your name the pass of "the said ship. At that time I shall receive the chitta in respect of the "said ship from the 7th instant; you shall take the ship to Porto Novo for "executing repairs." The ship was accordingly handed over to the defendant to take to Porto Novo to be repaired and he took her there, and thence to the mouth of the Coleroon which belongs to that port and where vessels of the size of the ship in question are repaired. There the ship sprang a leak and went to pieces about 26th August 1893. The sale-deed had not been executed by the plaintiff, nor was the sale registered when the vessel was destroyed and no executed sale-deed was ever tendered to the defendant.

In these circumstances. the Subordinate Judge dismissed the plaintiff's suit.

The plaintiff appeals and claims specific performance by the defendant of the agreement. He also appealed on certain questions of fact which it is unnecessary to deal with further than to say that we see no reason to think that the Subordinate Judge was wrong in his findings of fact.

The defendant contends that specific performance cannot be granted, because, *firstly*, the plaintiff did not claim it but only claimed a money payment and damages, whereas the agreement was that on the sale-deed being executed and registered by the plaintiff the defendant was

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to give a vatta chit for Rs. 5,000 on the risk of the ship; *secondly*, it was by the agreement a condition precedent that the plaintiff should execute and deliver to the defendant the sale-deed of the ship and register the transfer to him which was never done; and, *thirdly*, there can be no equitable ownership in a ship apart from the legal ownership, and Courts of Equity will not grant specific performance of an agreement for the sale of a ship, and he quoted in support [398] of this proposition the judgment of Wood, V.C., in the *Liverpool Borough Bank* v. *Turner* (1), where it is laid down that, since the passing of the Merchant Shipping Act, 17 and 18 Vict., c. 104, the only ownership in a vessel that can be created either in law or in equity is when the requirements of that Act have been complied with, *i.e.*, a sale-deed has been executed and the transfer has been registered, and in which case specific performance was refused. This case was followed by the Merchant Shipping Act Amendment Act, 25 and 26 Vict., c. 63, which by Section 3 says that certain equities may be enforced and it was argued by the appellant's Vakil that the law as to the manner in which valid sales might be made was thereby altered. The case of *Wārd* v. *Beck* (2), however, which discussed this Merchant Shipping Act Amendment Act quotes the judgment of Wood, V.C., in the above case and approves it, and it must therefore be considered as a binding authority as to the manner in which alone a valid sale of a ship can be effected.

For this reason, then the plaintiff's suit must fail, and we also think that for the other reasons urged by the defendant, the plaintiff cannot succeed in his action. We, therefore, dismiss the appeal with costs.

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**21 M. 398=8 M.L.J. 110.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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VIRASAMI CHETTI (*Petitioner-purchaser*) *Petitioner v.* LILADHARA VYASS (*Counter-petitioner*) *Respondent.** [10th December, 1897.]

*Civil Procedure Code—Act XIV of 1882, Sections 310 A, 315—Application by a purchaser for refund.*

A house was attached and sold as the property of one against whom a decree of the Small Cause Court, Madras, had been passed. The property was brought to sale, and the purchase money was paid into the Madras City Civil Court. The sale was set aside under Civil Procedure Code, Section 310A. Part of the purchase money was attached in execution of subsequent decrees passed against the same defendant by the Small Cause Court and was remitted to that Court [399] under the attachment. On an application by the purchaser for the refund of the purchase money by the various persons who had received portions thereof:

*Held*, that the City Civil Court had jurisdiction to entertain the application.

PETITION praying the High Court to revise the proceedings of P. Srinivasa Rau, Judge of the City Civil Court, Madras, on civil miscellaneous petition No. 573 of 1896 in the matter of execution petition No. 50 of 1893.

One Virasami Naidu obtained a decree in suit No. 4528 of 1892 on the file of the Madras Court of Small Causes, in execution of which a house was attached and brought to sale and purchased by R. Virasami Chetti for Rs. 790, which was paid into Court. The judgment-debtor obtained an order setting aside the sale under Civil Procedure Code,

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* Civil Revision Petition No. 93 of 1897.

(1) 29 L. J. Ch. 827. (2) 32 L.J. C.P. 113.

Section 310A, on payment by him into Court of the amount of the decree *i.e.*, Rs. 790 and the amount of Rs. 40 payable to the purchaser. In execution of subsequent decrees of the Small Cause Court against the same defendant, two sums of Rs. 39 and Rs. 89 were attached and paid over by the City Civil Court out of the sum of Rs. 790 paid in by the purchaser. The purchasor claimed to be entitled, under Civil Procedure Code, Section 315, to the refund of the 790 rupees and he now applied accordingly, the several decree-holders and the judgment-debtor being made parties to the application. The Judge of the City Civil Court dismissed the application on the ground that the money had not been paid out by that Court direct, but had been sent to the Small Cause Court under attachment thereupon.

1897 DEC. 10. — APPELLATE CIVIL. — 21 M. 398 = 8 M.L.J. 110.

The applicant preferred this appeal.

*Kumarasami Sastri* and *Visvanadha Sastri*, for petitioner.

*Lakshmana Chetti*, for respondent.

JUDGMENT.

We think that the Judge has misunderstood the scope of Section 315 of the Code of Civil Procedure. The fact that the purchase money was handed over to the Small Cause Court under an attachment issued by that Court makes no difference. The person who paid the purchase money is entitled, under Section 315, to recover the same by way of execution from the person who has actually received it. The fact that the Small Cause Court was the medium through which the money reached the hands of the party proceeded against cannot affect the rights or liabilities of the parties under Section 315. We must, therefore, set aside the order of the Judge and direct that the petition be restored to his file, and be disposed of according to law.

The petitioner must have his costs in both Courts.

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**21 M. 400 = 8 M.L.J. 53.**

**[400]** APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.*

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RANGA CHARIAR (*Defendant* No. 1), *Appellant v.* BALARAMASAMI CHETTI AND OTHERS (*Plaintiffs and Defendant No* 2), *Respondents.** [10th December, 1897.]

*Limitation Act—Act XV of* 1887, *Schedule II. Article* 179—*Step in aid of execution—Application for lists of properties attached.*

An application by a decree-holder for a list of the properties attached in execution of his decree is not a step in aid of execution within the meaning of the Limitation Act, Schedule II, Article 179.

[Rel., 11 C.L J. 243 = 5 Ind. Cas. 660 (663).]

APPEAL against the order of J. Hewetson, Acting District Judge of Chingleput, in appeal suit No. 523 of 1896, reversing the order of T. T. Ranga Chariar, District Munsif of Poonamallee, in execution petition No. 720 of 1896.

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* Appeal against Appellate Order No. 59 of 1897.

1897 DEC. 10. — APPELLATE CIVIL. — 21 M. 400 = 8 M.L.J. 53.

This was an application by the decree-holder in original suit No. 472 of 1890 on the file of the District Munsif, Poonamallee, which was passed on the 4th of May 1891. Properties of the judgment-debtor having been attached, the decree-holder now applied on the 14th of August 1896 under Civil Procedure Code, Section 235, that they be brought to sale. The last application in execution was made on the 21st June 1892, but, on the 25th of January 1895, the decree-holder applied for a list of the properties attached. The District Munsif dismissed the application as being barred by limitation, but the District Judge on appeal reversed his decision and remanded the matter ruling on the authority of *Kunhi* v. *Seshagiri* (1), that the application on the 25th of January 1895 was a step in aid of execution, and that the application accordingly was not barred by limitation.

The judgment-debtor preferred this application.

*Krishnamachariar*, for appellant.

*Sivagnana Mudaliar*, for respondents.

## JUDGMENT.

We think this case is clearly distinguishable from *Kunhi* v. *Seshagiri* (1).

**[401]** We cannot see how an application for a list of attached property can be said to be an application to take a step in aid of execution.

The appeal is allowed, and the District Munsif's order restored with all costs.

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**21 M. 401 = 8 M.L.J. 112.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

VENKAYYA GARU (*Petitioner*), *Appellant v.* VENKATA NARASIMHULU (*Counter-petitioner*), *Respondent.**
[13th December, 1897.]

*Guardians and Wards Act—Act VIII of* 1890, *Sections* 7, 8—*Testamentry appointment of a guardian.*

A Hindu mother has no authority to appoint a guardian for her son by will, it is accordingly the duty of the Court on an application under Guardians and Wards Act, 1890, for the appointment of a guardian for the son of a Hindu widow who had purported to make such an appointment to inquire, under Section, as to the necessity for an appointment being made and itself to appoint a fit and proper person.

APPEAL against the order of G. Campbell, District Judge of Ganjam, on miscellaneous petition No. 362 of 1896.

This was an application under Guardians and Wards Act, 1890, Section 8, for the appointment of a guardian of one Mushnuri Ramamurti, an infant aged ten years. It appeared that one Narasimhulu, who opposed the present application, had been appointed guardian by the will of the adopted mother of the infant. The District Judge dismissed the application, seeing no sufficient reason to interfere under the above circumstances.

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* Appeal against Order No. 129 of 1897.

(1) 5 M. 141.

1897 DEC. 13. — APPELLATE CIVIL. — 21 M. 401 = 8 M.L.J. 112.

The applicant preferred this appeal.

*Vydianadha Ayyar* and *Pattabhirama Ayyar*, for appellant.

Mr. *N. Subramanyam*, for respondent.

JUDGMENT.

Assuming that the will in this case is genuine (a question, however, which has not been tried), the appointment by it of a guardian cannot be held to be such an appointment as comes within Section 7, Clause 3, of the Guardians and Wards Act, for a [402] Hindu mother has no authority to make such appointment by will. It was, therefore, the duty of the Court to have enquired under Section 7 as to the necessity for appointing a guardian, and, if necessary, to have appointed a fit and proper person. In making such appointment he might very properly take into consideration the wishes of the mother expressed in any genuine will.

We must therefore set aside the order of the District Judge and direct him to restore the petition to his file and to dispose of it according to law. Costs will abide and follow the result.

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21 M. 402.

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

SITARAMA CHARYA *(Petitioner), Appellant* v. KESAVA CHARYA *(Petitioner), Respondent.** [13th December, 1897.]

*Lunatic—Act XXXV of* 1858—*Guardian for property of lunatic—Lunatic trustee of a mutt.*

A guardian may be appointed under Act XXXV of 1858 to the property vested in a lunatic as the head of a mutt.

[R., 27 M. 435 = 14 M.L.J. 105.]

APPEAL against the order of H. G. Joseph, District Judge of South Canara, in civil miscellaneous petitions Nos. 312 and 348 of 1896.

In the order appealed against the District Judge appointed a guardian to a lunatic, Vidyanidhi Tirtha Swami, the trustee of the Bhandarkeri mutt whose disciple, Vidyanidhi Samudra Tirtha Swami, was an infant. The present appeal was preferred by the father of the infant and the brother of the lunatic, who sought to be appointed guardian of the infant and who, it was alleged, had become the sole trustee by reason of the lunacy. The respondent was the person who had been appointed guardian to the lunatic.

*Pattabhirama Ayyar* and *Madhava Rau*, for appellant.

*Ramachandra Rau Saheb* and *Narayana Rau*, for respondent.

JUDGMENT.

It is not alleged that any one is entitled jointly with the lunatic to the possession or control of the estate, and, [403] therefore, the cases (*Sham Kuar* v. *Mohanunda Sahoy* (1), *Jhabbu Singh* v. *Ganga Bishan* (2), and *Virupakshappa* v. *Nilgangava* (3) are not in point.

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* Appeal against Order No. 126 of 1897.

(1) 19 C. 301. (2) 17 A. 529. (3) 19 B. 309.

1897 DEC. 13. — APPELLATE CIVIL. — 21 M. 402.

It is next contended that the Judge had no jurisdiction to appoint a guardian for the property inasmuch as it was in the nature of trust property. The person adjudged to be a lunatic is the head of a mutt. His exact position and right in regard to the property vested in him as head of the mutt have not been investigated as the point was not raised in the Court below.

*Prima facie*, however, we must take it that the lunatic's right is similar to that of the heads of the mutts referred to in *Sammantha Pandara* v. *Sellappa Chetti* (1) and *Giyana Sambandha Pandara Sannadhi* v *Kandasami Tambiran* (2). In this view it is quite clear that a guardian for such property may be appointed under Act XXXV of 1858. The term "estate" used in the Act is very wide, and may properly be held to include such interest as the head of the mutt has in the property. It is not necessary for us to go further and decide whether the Act would be applicable if the property were trust property, pure and simple.

On the merit we think the Judge's order is right.

We dismiss the appeal with costs.

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**21 M. 403=8 M.L.J. 189.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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VIRABHADRAPPA CHETTI (*Counter-petitioner*), *Appellant v.* CHINNAMMA (*Petitioner*), *Respondent.**
[13th December 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Section* 158—*Application for succession certificate—Order for costs of adjournment against opposing party—Effect of non-compliance with such order.*

A widow applied for a succession certificate to her late husband. The application was opposed by his brother who claimed to have been undivided from him. **[404]** The matter came on for hearing, but was adjourned on his application, he being ordered to pay the costs. He failed to pay the costs, and the certificate was issued to the widow:

*Held*, that Section 158 of the Civil Procedure Code was inapplicable to the case in the absence of a specific order making the payment of costs a condition precedent to the hearing of the evidence of the party in default.

[R., 22 M. 172; 27 M. 255=14 M.L.J. 356 (F.B).]

APPEAL against the order of E. J. Sewell, District Judge of North Arcot, on miscellaneous petition No. 600 of 1895.

This was an application under Succession Certificate Act VII of 1889, Section 6, by the widow of one Basalingappa Chetti deceased, for the issue to her of a succession certificate in respect of her estate. The opposite party was a brother of the deceased who claimed to have been undivided with him at the time of his death, and he also set up an award of certain arbitrators in bar of the applicant's claim. The matter having come on for hearing, the applicant was ready to proceed, but on the application of the brother the hearing was adjourned, he being ordered to pay the costs of the adjournment. On the matter coming on again for hearing, it appeared that the order as to costs had not been complied with, and the Judge after referring to these circumstances said:—"The order has

* Appeal against Order No. 59 of 1897.

(1) 2 M. 175. (2) 10 M. 375.

"not been complied with; under Section 158 of the Civil Procedure Code, "the certificate is granted to the petitioner Chinnamma." 1897 DEC. 13.

The brother preferred this appeal.

*Tiagaraja Ayyar*, for appellant. APPELLATE CIVIL.

*Raghavendra Rau*, for respondent.

JUDGMENT.

So far as appears from the record, the District Judge seems to have dismissed the petition under Section 158 of the Code of Civil Procedure on the ground that the costs which the counter-petitioner (appellant before us) had been ordered to pay had not been paid. Such costs would ordinarily be recoverable in execution, and, in the absence of a specific order making their payment a condition precedent to hearing the counter-petitioner's evidence, the counter-petitioner's failure to pay would not render Section 158 applicable. 21 M. 403 = 8 M.L.J. 189.

We must, therefore, set aside the order of the District Judge and direct that the petition be restored to the file and be dealt with according to law. Costs will abide and follow the result.

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21 M. 405.

## [405] APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.*

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KOMBI ACHEN AND OTHERS (*Plaintiffs Nos.* 1 *and* 2 *and* 4 *to* 16), *Appellants v.* PANGI ACHEN AND ANOTHER (*Defendant and Plaintiff No.* 3), *Respondents.** [13th December, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Section* 522—*Decree in accordance with an award—Appeal.*

A suit having been referred to an arbitrator, he made an award and a decree was passed, in accordance with it, in favour of the defendant. On an appeal by the plaintiff it appeared that the award was *prima facie* legal and proper;

*Held*, that no appeal lay against the decree.

APPEAL against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in original suit No. 4 of 1893.

The plaintiffs and defendants were members of a Malabar edom, and the plaintiffs sued for a decree removing the defendant from management and for the appointment of fresh managers and to recover certain sums wrongly appropriated and retained by the defendant. The case was fully heard, but before judgment was delivered the parties agreed to submit the dispute to arbitration and an arbitrator was appointed. The arbitrator made his award which was in favour of the defendant. The plaintiff then applied, under Civil Procedure Code, Section 521, to have the award set aside on the grounds of the arbitrator's partiality, of his refusal to examine fresh witnesses, and of his failure to give notice to the plaintiffs as to the time of hearing. A further ground, which was alleged, was that it was agreed that the arbitrator should endeavour to bring the parties into agreement but that, if he failed to do so, he should not pronounce an award against the consent of either party, but should leave the matter to be determined by the Court.

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* Appeal No. 171 of 1896.

1897
DEC. 13.
APPELLATE
CIVIL.
21 M. 405.

The Subordinate Judge refused to hear evidence as to the last matter which was inconsistent with the order of reference, and he [406] determined the other points raised in favour of the defendants and he accordingly passed a decree confirming the award and dismissed the suit.

The plaintiffs preferred this appeal.

*Sundara Ayyar*, for appellants.

*Ryru Nambyar*, for respondent No. 1.

*Bhaskara Menon*, for respondent No. 2.

## JUDGMENT.

There is no doubt in this case as to the *factum* of the award and *prima facie* the award is legal and proper.

The Court below holding that there was no cause shown for setting aside the award passed a decree in accordance with it.

Having regard to Section 522 of the Civil Procedure Code, we are clearly of opinion that no appeal lies against such a decree. We are referred to no case decided in this Court in which the contrary has been held.

The appeal is dismissed with costs.

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**21 M. 406=8 M.L.J. 119.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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NELLAIYAPPA PILLAI (*Plaintiff*), *Appellant*, *v.* THANGAMA NACHIYAR AND OTHERS (*Defendants*), *Respondents.**
[14th December, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Sections* 30, 539—*Public charity—Suit by trustee.*

The trustee of a temple sued to recover from the representatives of the trustee of a fund constituted for special purposes in connection with the temple worship, a sum of money misappropriated by him and to obtain the appointment in his place of himself or some other fit person. The plaintiff obtained leave to sue under Civil Procedure Code, Section 30, but no sanction had been obtained under Section 539:

*Held*, that the suit was maintainable.

[F., 33 C. 789=10 C W.N. 581; R., 1 S.L.R. 155.]

APPEAL against the order of S. Gopala Chari, Subordinate Judge of Tinnevelly, in original suit No. 33 of 1896, by which it was ordered that the plaint be returned to be presented in a proper Court.

[407] The plaintiff was the trustee of a temple under the management of the Devastanam committee of the Tinnevelly district and the plaint contained the following allegations. A special fund had been collected for the purpose of supplementing the Government allowance for the worship in the temple. The fund was constituted of a sum of Rs. 5,000 contributed by certain persons including one Nellaikumara Pillai, who was the trustee and manager of the fund. He appropriated part of it and died on the 1st of December 1893, leaving, as his legal representatives, the defendants who were in possession of his estate.

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* Appeal against Order No. 139 of 1897.

The plaint further alleged that the defendants had been called upon to make good the amount, but had failed to do so, and it continued as follows:— **1897 DEC. 14.**

"As there is no trustee now for the management of the said service "and as no arrangements were made originally regarding the appointment "of a trustee after the said Nellaikumaru Pillai, the trustee for the said "service has now to be appointed by this Court. **APPELLATE CIVIL.**

"As the plaintiff is the trustee for the temple to which the said service "is due, as he is interested in the proper conducting of the service and as "he is competent to look after the said service work, it is proper that he "should be appointed as the trustee for the said service. **21 M. 406 = 8 M.L.J. 119.**

"As the plaintiff, besides being the trustee for the said Thonda Nainar "temple, is as much interested in the said service as any others of Hindu "religion having the same interest, he is entitled to bring a suit under "Section 30, Civil Procedure Code, for the collection of the amount from "the defendants and for the appointment of a trustee for the said service."

The prayer of the plaint was that the money misappropriated be paid to the plaintiff or to the trustee that might be appointed for the said service and "that this plaintiff be appointed as the trustee for conducting "the said service 'charity' or that any other competent man be appointed "as the trustee as the Court deems fit."

Together with the plaint the plaintiff presented a petition for leave to sue under Section 30, Civil Procedure Code, which was granted, service thereunder being ordered. Three preliminary issues were framed as follows:—

**[408]** "(1) Whether the suit is not maintainable for want of sanction "under Section 539 of the Civil Procedure Code?

"(2) Whether the claim falls under Section 539 of the Civil Procedure "Code and the suit is not in consequence cognizable by this Court?

"(3) Whether plaintiff's suit is not sustainable under Section 30, "Civil Procedure Code?"

Of these issues the Subordinate Judge, determined only the second, on which he held that the suit was not cognizable by him and he accordingly made the order now appealed against.

The plaintiff preferred this appeal.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*) and *Ramakrishna Ayyar*, for appellant.

*Sundara Ayyar* and *Srinivasa Ayyangar*, for respondents.

JUDGMENT.

In our opinion the Subordinate Judge has overlooked the circumstance that the plaintiff in this case was the general trustee of the temple and as such held a special position in regard to the protection of its interests. In that character it was not only his right, but his duty to see that the temple funds in the hands of special trustees were duly appropriated (Cf. *Jeyangarulavaru* v. *Durma Dossji* (1)), and even before the enactment in 1877 of the provision now embodied in Section 539 of the Civil Procedure Code he would have been entitled to resort to the ordinary courts to enforce the obligations of the special trustees, and to obtain all appropriate relief for the protection of the interests of the temple. He would have been entitled to have sued for the removal of such trustees for malversation, and, if there was no other provision for filling

(1) 4 M. H. C. R. 2.

1897 DEC. 14. — APPELLATE CIVIL. — 21 M. 406 = 8 M.L.J. 119.

up the vacancy, he could have asked the Court to appoint fresh trustees. We do not think that such right was intended to be affected by Section 539 of the Civil Procedure Code. If that section were held to apply to the case of a person in the position of the present plaintiff, the rights which he had prior to the enactment would be seriously restricted, inasmuch as the exercise of his rights would be made dependent on the sanction of the Advocate-General or Collector as the case might be. It is difficult to believe that special rights of the character in question were intended to be so restricted.

[409] We agree with the learned Advocate-General that the section was intended to apply to persons who, before its enactment, had, or were believed to have, no right to take proceedings for the purposes mentioned in the section, and in their case the limitation requiring previous sanction for the suit was one that was necessary to prevent an abuse of the powers conferred.

We have not thought it necessary to refer to the decisions of the High Courts in other parts of India, as they proceed on a view which has not been accepted by the Full Bench decision of this Court (*Rangasami Naickan* v. *Varadappa Naickan* (1). Our view is in accordance with the principle underlying the decision in *Srinivasa Ayyangar* v. *Srinivasa Swami* (2), and the unreported cases therein cited.

We, therefore, set aside the order of the Subordinate Judge and direct that the plaint be received by him and that the suit be then disposed of in accordance with law.

Costs will abide and follow the result.

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**21 M. 409 = 8 M.L.J. 51.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

PERIATAMBI UDAYAN (*Defendant No.* 1), *Petitioner v.* VELLAYA GOUNDAN AND ANOTHER (*Plaintiffs*), *Respondents.**
[15th December, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Section* 258-*A—Adjustment out of Court—Subsequent execution by decree-holder—Suit to recover money paid on adjustment.*

It was agreed between a decree-holder and the judgment-debtors that the former should accept Rs. 200 which was paid in full satisfaction of the decree, and should certify the adjustment to the Court, and that an attachment already placed on the judgment-debtor's property should be raised. The decree-holder accepted the money, but did not carry out his part of the agreement, and more than two years later applied for execution which was ordered to issue, the judgment-debtor's objections being dismissed as out of time. The judgment-debtors now sued in a Small Cause Court to recover the money paid to satisfy the decree:

*Held*, that the plaintiffs were entitled to recover.

[F., 30 A. 461 = 5 A.L.J. 475 = A.W.N. (1908) (220); 29 M. 312 = 16 M.L.J. 33; 17 M.L.J. 527; 24 M.L.J. 541 (544) = 10 M.L.T. 396 = (1911) M.W.N. 473; R. 12 C.L.J. 312 (313) = 7 Ind. Cas. 55; 16 C.L.J. 174 = 16 C.W.N. 923 = 13 Ind. Cas. 63; 5 Ind. Cas. 814 = 16 P.R. 1910 = 62 P.L.R. 110 = 18 P.W.R. 1910.]

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* Civil Revision Petition No. 126 of 1897.

(1) 17 M. 462. (2) 16 M. 31.

1897 DEC. 15. APPELLATE CIVIL. 21 M. 409 = 8 M.L.J. 51.

[410] PETITION under Provincial Small Cause Courts Act IX of 1887, Section 25, praying the High Court to revise the proceedings of K. Ramachandra Ayyar, Acting Subordinate Judge of Salem.

The plaintiffs sued to recover from the defendants the sum of Rs. 200 claimed to be due on the following circumstances :—

In original suit No. 401 of 1890 on the file of the District Munsif's Court, Salem, the present defendant No. 1 obtained a decree against the present plaintiffs Nos. 1 and 2 and defendants Nos. 3 and 4. In execution, moveable property belonging to the judgment-debtors were attached on the 26th of October 1893. Negotiation then began between the decree-holder and the judgment-debtors, and the former agreed to receive Rs. 200 in full discharge of the decree, provided payment was made in one month. Accordingly in November the present plaintiffs paid Rs. 200 through the monigar, who was defendant No. 2 in the suit and now stated to be in collusion with the decree-holder, to the decree-holder who gave a receipt to defendant No. 2 and promised to have satisfaction of the decree entered up in Court, and to have the attachment raised. The decree-holder in violation of the agreement applied for execution in July 1896. The plaintiffs in various petitions raised objections to the execution, but they were dismissed as being out of time. They accordingly sued as above to recover the money. The Subordinate Judge passed a decree for the plaintiffs.

Defendant No. 1 preferred this petition.

*Seshagiri Ayyar*, for petitioner.

*Sadagopachariar*, for respondents.

## JUDGMENT.

The finding is that the money was paid in full discharge of the judgment-debt, the first defendant undertaking to enter up satisfaction. No satisfaction was entered up and no application to compel the first defendant to fulfil his undertaking was made by plaintiff within sixty days of the payment. It was, therefore, not competent to the executing Court to determine whether the payment had been made or not. The only course open to the plaintiff was that which he followed, *viz.*, to bring a suit for the amount. The fact that no application was made by the plaintiff within sixty days distinguishes the present case from *Guruvayya* v. *Vudayappa* (1). As the Courts there held that it was open to the plaintiff to seek relief in execution, it must be taken [411] that the application was made within sixty days, thought the report does not expressly state this. In the case of *Rāma Ayyan* v. *Sreenivasa Pattar* (2), the person relying on the adjustment was not entitled to make any application under Section 258, Civil Procedure Code, within sixty days from the date of the adjustment, as against the person who denied the payment, inasmuch as the latter was not then an assignee. That decision cannot be taken to justify an enquiry into an alleged adjustment after the expiry of sixty days from the time when a party relying on the adjustment had become entitled to apply for the adjustment to be recorded. We must, therefore, dismiss the petition with costs.

(1) 18 M. 26. (2) 19 M. 230.

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FEB. 22.

APPEL-
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CIVIL.

21 M. 411.

21 M. 411.

## APPELLATE CIVIL.

*Before Mr. Justice Davies and Mr. Justice Boddam.*

ACHUTAN NAYAR (*Defendant No.* 30), *Appellant v.* NARASIMHAM PATTER (*Plaintiff No.* 2), *Respondent.** [22nd February, 1897.]

*Malabar Compensation for Tenants' Improvements Act (Madras)—Act I of* 1887*—Timber trees.*

In a suit to redeem a kanom of land on which timber has grown, the jenmi is not entitled to be credited with half the value of the timber.

[Appr., 24 M. 47 (F.B.).]

SECOND appeal against the decree of A. Venkataramana Poi, Subordinate Judge of South Malabar, in appeal suit No. 93 of 1894, confirming the decree of V. Rama Sastri, District Munsif of Temelprom, in original suit No. 27 of 1891.

Suit to redeem a kanom. The main question related to the amount of compensation payable by the plaintiff in respect of timber trees. The District Munsif said as to this point:—"The last item of improvements "to be considered forms the trees. The fruit-bearing trees are few, but "there are many teak and other trees of valuable timber. The question "how far the tenants are to be considered as the makers of this class of "improvement is not free from difficulty. The demise of 1017 [412] "(1841—42) recites 'the karimpana and other trees standing on these "paddy lands and parambas' as part of the property demised, and indi-"cates them to be the jenmi's property. It is probable that the kanom "of 1,000 fanams under the earlier demise of 986 (1810-11) was raised to "800 paras and 3,031 fanams in 1017 (1841-42) partly for compensation "for some of the improvements, but there is no evidence on this point. "Whatever might be the cause of showing a larger kanom in the demise "of 1017 (1841—42), the safest rule to adopt would be to accept as jenmi's "property whatever is included in the demise as his, unless and until the "contrary be established by clear and unmistakable evidence. If the "earlier demise be silent as to the trees, it would not necessarily follow "against the express recital in Exhibit IX that the trees must have been "the tenant's property. In examining the several items of trees in the third "Commissioner's accounts, I find, however, only a few of them 60 years and "above, all the rest being below 60 years apparently grown subsequent to "the year 1017 (1841-42). Those of 60 years and above may be presumed "to be the jenmi's property for which no compensation is needed . . . . "adopt the latter valuation. But as ruled by the High Court in *Govinda* "*Menon* v. *Damodaran Nambudripad* (1) in the case of timber trees, one "half of their value is to be deducted in favour of the jenmi." The District Munsif awarded accordingly as compensation only Rs. 747-10-9 being half the value of trees; and the Subordinate Judge upheld this award.

Defendant No. 30 preferred this second appeal.

*Ryru Nambiar*, for appellant.

*Sundara Ayyar*, for respondent.

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* Second Appeal No. 1603 of 1895.

(1) Second Appeal No. 194 of 1889 (unreported).

1897 FEB. 22. APPELLATE CIVIL. 21 M. 411.

## JUDGMENT.

The value of such of the thirtieth defendant's improvements as consisted of timber trees, &c., was found to be Rs. 1,505-8 6. The Munsif disallowed about half of this amount as the landlord's share, on the authority of an unreported decision of this Court (*Govinda Menon* v. *Damodaran Nambudripad* (1)). We do not find in that decision any such authority as is supposed, nor is there anything in the Malabar Compensation for Tenants' Improvements Act I of 1887 authorizing the distribution of any share of any improvement to the landlord. The point that the one **[413]** half deduction that had been made in the total amount above referred to was wrong was taken in the appeal grounds to the Lower Appellate Court, but the objection was overruled by the Subordinate Judge without his noticing the true ground on which it was made. We are of opinion that the disallowance of half the amount found due for the improvements proceeded on an erroneous view of the law, and that there is nothing to justify it. We must, therefore, so far, allow this appeal as to direct that the sum of Rs. 757-13-9 disallowed by the Lower Courts be added to the amount decreed to the thirtieth defendant for kanom and improvements. We are not prepared to rule that the data on which the value of the reclamation improvements was calculated were wrong, in principle, and we dismiss this ground of appeal. The parties will bear their own costs in this and the Lower Appellate Court. Time for redemption is extended for three months from this date.

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**21 M. 413.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

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VENKATAGIRI RAJAH (*Plaintiff*) *v.* RAMASAMI (*Defendant*).*
[15th October, 1897.]

*Rent Recovery Act (Madras)—Act VIII of* 1865, *Section* 14 —*Suit for rent—Limitation.*

When a tenant has executed a muchalka specifying the dates on which the various instalments of rent are payable, the period of limitation for a suit by the landlord for the rent is to be computed from such dates.

[F., 10 M.L.J. 26 ; R., 27 M. 241 = 14 M.L.J. 67 (F.B.).]

CASE stated under Civil Procedure Code, Section 617, by T. Sami Ayyar, District Munsif of Ongole, in small cause suit No. 243 of 1897.

The case was stated as follows:

"In small cause suit No. 243 of 1897 on this Court's file, the Rajah of Venkatagiri has instituted a suit against one of his tenants for recovery of rent amounting to Rs. 7-13-8, being the arrears with interest due for fasli 1303 which commenced from 1st July 1893 and ended with the 30th June 1894. The suit is **[414]** based on a muchalka in writing, executed by the defendant on the 31st March 1894, which stipulates for payment according to three kistbandies, the last of which fell on the 30th January preceding. The plaint was presented on the 30th June 1897.

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* Referred Case No. 18 of 1897.

(1) Second Appeal No. 194 of 1889 (unreported).

1897 OCT. 15. — APPELLATE CIVIL. — 21 M. 413.

" Defendant raises the contention that the suit is barred by limitation, as it has been instituted more than three years from the date of the prescribed kistbandies and more than three years from the date of the muchalka. It is argued for the plaintiff that, under the special rule of limitation provided by Section 2 of Act VIII of 1865, he had a right to claim rent until the last day of the fasli and that in consequence he was entitled to take that as the starting point for limitation. In support of this argument, plaintiff's pleader quoted *Appayasami* v. *Subba*(1). But in the latter decision (*Sobhanadri Appa Rau* v. *Chalamanna*(2)), it has been distinctly held that the ruling in *Appayasami* v. *Subba* (1) only applies to the special proceedings authorized by Section 2 of the Rent Recovery Act, and that it does not apply to a suit for recovery of rent. It is also laid down therein that the rule of limitation applicable to a suit of this kind is what has been provided for by Article 110 of the second schedule to the Limitation Act. According to this article the period of limitation for such suits is three years calculated from the time when the arrears fell due. The question now is when did the arrears become due. Was it on the dates specified in the kistbandies, or was it on the date of the muchalka, or was it on the last day of the fasli year? There are no reported cases so far as I have been able to ascertain in which this question was expressly raised and decided. The only case which affords any clue for a decision of the question is *Sobhanadri Appa Rau* v. *Chalamanna*(2) above quoted. There the question as to the period from which time commenced to run alternated between the date of the kistbandies and that on which the landlord acquired the status to sue. Under Section 7 of the Rent Recovery Act, the right to sue accrues on the exchange of pattas and muchalkas. If these had been exchanged without any hitch before the dates specified as kistbandies, it seems to me that the latter would furnish the starting point for limitation. If the exchange took place after date fixed for the kistbandies either by agreement or by the **[415]** force of a decree obtained under Section 10, as it was in *Sobhanadri Appa Rau* v. *Chalamanna* (2) then according to the *dictum* laid down thereby, time will begin to run from the date when the exchange has taken place. In this case the giving of a muchalka by the tenant was a voluntary act and it took place on the 31st March 1894. Though the kistbandies should in the natural course be held as fixing the dates when the arrears become payable, when the exchange of pattas and muchalkas takes place on a later date, it seems to follow from the decision referred to, that the date of the muchalka must be taken as the period from which limitation should be reckoned. The contract evidenced by the muchalka would further operate as an acknowledgment of the liability for rent provided by the kistbandies, and the date of the acknowledgment would, under Section 19 of the Limitation Act, furnish a fresh starting point for limitation. On the whole, my opinion on the question submitted for decision is that time begins to run from the date of the muchalka. The only reason for my entertaining a doubt on the point is because the landlord has a right to tender patta until the last day of the fasli year and if he had done so, he would have been entitled to sue for the rent within three years of that date."

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*) and *Desikachariar*, for plaintiff.

The defendant was not represented.

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(1) 13 M. 463. (2) 17 M. 225.

1897 Oct. 15. — Appellate Civil. — 21 M. 413.

JUDGMENT.

According to the contract evidenced by the muchalka in the case before us the rent was payable in three instalments, and each instalment which remained unpaid on the date it ought to have been paid became at once an arrear (see Section 14 of the Rent Recovery Act). Time began therefore to run from the dates specified in the kistbandi, that is, the dates on which the instalments fell due and not from either of the other dates mentioned in the reference.

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**21 M. 416=8 M.L J. 54.**

## [416] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

SRINIVASA AYYANGAR (*Defendant No.* 6), *Appellant v.*
AYYATHORAI PILLAI (*Plaintiff*), *Respondent.**
[7th and 9th December, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Sections* 244, 310*A*—*Right of a mortgagee to the benefit of Section* 310 *A*—*Appeal against order adverse to mortgagee.*

A mortgagee being a party to a suit objected that the mortgage premises had been attached and sold in execution of the decree and applied to have the sale set aside on payment being made by him under Civil Procedure Code, Section 310A. The purchaser was the decree-holder. The application having been refused by the Courts of First Instance and first appeal the applicant appealed to the High Court:

*Held*, that the appeal was maintainable and the appellant was entitled to the relief sought.

[**F.**, 30 M. 507=17 M.L.J. 291=2 M.L.T. 347; **Appr.**, 25 B. 104; 29 C. 1=5 C.W.N. 821; 23 M. 286; **R.**, 25 M. 244 (**F.B.**); 13 C.L.J. 467 (469)=10 Ind. Cas. 51 (53); 24 M.L.J. 205 (209)=13 M.L.T. 123=(1913) M.W.N. 101; 5 O.C. 377; **D.**, 30 C. 425; 5 C.L.J. 204.]

APPEAL against the order of F.H. Hamnett, Acting District Judge of Tanjore, on appeal against order No. 33 of 1896, affirming the order of T. Ramasami Ayyar, District Munsif of Tirutturaippundi, on miscellaneous petition No. 393 of 1896 in original suit No. 157 of 1890.

This was an application by the sixth defendant that a sale of land held in execution of the decree in the above suit be set aside under Civil Procedure Code, Section 310A, on payment being made by him under the decree. The applicant was a mortgagee of the land in question. The District Munsif refused the application and his decision was upheld on appeal by the District Judge.

The applicant preferred this appeal.

*Gopalasami Ayyangar*, for appellant.

*V. Krishnasami Ayyar*, for respondent.

JUDGMENT.

We cannot accept the respondent's contention that no appeal lies in this case. The respondent before us, who is the purchaser, is the decree-holder. The question is one which arises in execution between him and the appellant before us who is also a party to the suit. The order therefore must be treated **[417]** as one falling under Section 244, Code of Civil Procedure, and therefore appealable.

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* Appeal against Appellate Order No. 41 of 1897.

1897 DEC. 9. — APPELLATE CIVIL. — 21 M. 416 = 8 M.L.J. 54.

It is next objected that the appellant before us being only a mortgagee is not entitled to the benefit of Section 310 A, Code of Civil Procedure. On the analogy of the decision in *Rakhal Chunder Bose* v. *Dwarka Nath Misser* (1) we think that the appellant is an "owner of the immoveable property" within the meaning of Section 310 A, and as his mortgage was subject to the right of the respondent under the mortgage decree in execution of which the sale took place, he would be affected by the sale, and should therefore be held entitled to ask for cancellation of the sale on making the payments prescribed by that section, (*Cf. Asmutunnissa Begum* v. *Ashruff Ali* (2)). We must therefore set aside the orders of the Lower Courts and direct the petition to be restored to the file of the District Munsif, and the appellant must be allowed to pay into Court the sum payable under Section 310 A within a time to be fixed by the District Munsif, and of which reasonable notice is to be given to both parties. If the payment is made within the time fixed, the sale should be set aside. In default the petition will stand dismissed with costs throughout.

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**21 M. 417 = 8 M.L.J. 77.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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SAMI PILLAI (*Petitioner*), *Appellant v.* KRISHNASAMI CHETTI AND OTHERS (*Counter-Petitioners*), *Respondents.** [9th December, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Sections* 244, 311, 588 *—Execution proceedings at instance of attaching creditor—Party to a suit—Right of appeal - Irregular sale.*

A attached a decree which B, his judgment-debtor, had obtained against C, and in execution thereof he brought to sale land belonging to C. After the publication of the proclamation of sale, one of the advertised lots was subdivided [418] into various lots for the purposes of the sale. B applied to have the sale set aside, and his application was refused.

*Held*, that B had a right of appeal under Civil Procedure Code, Section 311, and not under Section 244, but that the sub-division of the lots was no irregularity and the appellant was not entitled to the relief sought by him.

[R., 35 M. 622 (623) = 9 Ind. Cas. 786 = 21 M.L.J. 577 = 9 M.L.T. 312 = (1911) M.W.N. 187 ; 5 Ind. Cas. 56 = 7 M.L.T. 262 (263).]

APPEAL against the order of L. C. Miller, Acting District Judge of Trichinopoly, in miscellaneous petitions Nos. 511 and 511A of 1896.

This was an application under Civil Procedure Code, Section 244, to have set aside a sale that was held in execution of the decree in original suit No. 5 of 1888. The execution had proceeded at the instance of certain persons who, in execution of a decree against the applicant, had attached the decree obtained by him in the above suit. A like application was made by the same applicant under Section 311. He objected to the mode in which the attachment had taken place, and also to the circumstance that one of the lots which was advertised for sale was subsequently divided into five lots for the purpose of the sale.

The District Judge dismissed both the applications and the applicant preferred this appeal.

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* Appeal against Order No. 63 of 1897.

(1) 13 C. 346. (2) 15 C. 488 (491, 492).

*Desikachariar*, for appellant. 1897 DEC. 9.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*), *V. Krishnasami Ayyar*, *Ranga Ramanujachariar* and *R. A. Krishnasami Ayyar*, for respondents.

APPELLATE CIVIL.

21 M. 417 = 8 M.L.J. 77.

## JUDGMENT.

We must hold that the appellant is not entitled to appeal under Section 244, Civil Procedure Code. No doubt the respondents Nos. 1 to 3 as attaching creditors in original suit No. 21 of 1894, became entitled to execute the decree in original suit No. 5 of 1888, but the sale took place in execution of the latter decree, and so far as original suit No. 5 of 1888 is concerned these respondents cannot be held to be parties to the suit, so as to entitle the appellant to treat any question arising between him and them as one under Section 244. We, however, think that he is entitled to appeal under Section 311.

The right of the said respondents to execute as attaching creditors of the decree in original suit No. 5 of 1888 is a special right created by Section 273, Civil Procedure Code; but they do not thereby become transferees of the decree as was contended on their behalf before us. The holder of the decree in original suit No. 5 of 1888 remains decree-holder notwithstanding the **[419]** attachment of his rights and as such he was entitled to apply under Section 311 and to appeal against the order passed under that section.

Turning now to the merits the only irregularity that was pressed before us as vitiating the sale was that lot No. 1 of the property was sold in five sub-lots. Having regard to the facts stated by the Judge in his order and to the other circumstances of the case, we do not think that this was an irregularity at all, but was a prudent step in the interest of all concerned.

The result is that we dismiss the appeal with costs.

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**21 M. 419.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

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SUBRAMANIA PILLAI (*Defendant No.* 1), *Petitioner v.*
SUBRAMANIA AYYAR (*Plaintiff*), *Respondent.**
[10th December, 1897.]

*Civil Procedure Code—Act XIV of* 1882, *Sections* 78, 80, 82—*Substituted service—Duty of process-server.*

Mere temporary absence of a person to be served does not justify the process-server in affixing the summons to a door. It is the duty of the process-server to take pains to find out the person to be served in order that, if possible, personal service may be effected.

[**F.**, 29 M. 324; 2 N.L.R. 63; **R.**, 5 C.L.J. 555; 8 Ind. Cas. 849 = 9 M.L.T. 118 (120); 16 Ind. Cas. 600 = 16 O.C. 83 (84); **D.**, 13 Ind. Cas. 127 (128).]

PETITION under Provincial Small Cause Courts Act IX of 1887, Section 25, praying the High Court to revise the proceedings of S. Gopala Chariar, Subordinate Judge of Tinnevelly, in small cause suit No. 1427 of 1896.

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* Civil Revision Petition No. 102 of 1897.

1897 Dec. 10. — APPELLATE CIVIL. — 21 M. 419.

A decree had been passed in favour of the plaintiff, the defendants having been declared *ex parte*. The defendants then made an application under Civil Procedure Code, Section 108, and Provincial Small Cause Courts Act, 1887, Section 17, praying that the decree be set aside and that the suit be tried on the ground that they had not been served with the summons.

The allegations contained in the plaint were as follows:—

"It is learnt that a decree has been passed in the said suit, "declaring the defendants *ex parte*.

[420] "The defendants have not to pay the plaintiff in the said suit "any amount in any matter.

"It is learnt that the summonses have been returned falsely, stating "that the defendants Nos. 1, 2 and 3 were not present at their residence "and that they (summonses) were affixed in their houses.

"No summonses were served on the defendants in the said suit; "neither were they affixed. The defendants are unaware of the subject-"matter of the said plaint.

"Of the said defendants, defendants Nos. 1 and 3 have been perma-"nently residing in Pottanur and second defendant in Puthaneri.

"I therefore pray that the Court may be pleased to cancel the decree "passed in the said suit declaring the defendants *ex parte*, hear the con-"tentions of these defendants and pass a fresh decree."

The return of the serving officer was as follows:—

"On making inquiries about the guardian herein mentioned on 24th "instant, the females of the said person's house and the neighbours said "that he left for Tinnevelly two days ago and that there were no heirs "(male members), and, therefore, at the place the copies of the notice "issued for the minors Nos. 1, 2 and 3 have been affixed to the front door "of the said guardian's house. I solemnly declare that, in respect of the "said particulars, I have obtained athatchi (statements) from the big "landholders of the said village."

The Subordinate Judge refused to set aside the decree. He referred to *Nobodeep Chunder Shaha* v. *Sonaram Dass* (1) and said:—"In the cir-"cumstances I must find that first defendant had not proved the truth of "his case and that he had or must have had knowledge of the suit.

"As regards the second defendant, defendants' witnesses Nos. 1 to 3 "seek to make out that he permanently resides in Puthaneri 6 miles off. "But he is an undivided son of first defendant, and I find, on evidence of "plaintiff's witness No. 2, that he used to reside in both places and that "there was constant communication between second defendant and the "other members of his family. Section 78 provides that, in the absence "of a defendant, his summons may be served on any adult male member "of the family [421] residing with him, and such a person first defend-"ant undoubtedly was. If first defendant is to be deemed to have been "duly served, then such service is enough to bind second defendant also."

Defendant No. 1 preferred this petition.

*Ramasubba Ayyar*, for petitioner.

*Seshagiri Ayyar*, for respondent.

## JUDGMENT.

We do not think that the service in this case was proper. Mere temporary absence of the person to be served does not justify the process

(1) 4 C. 592.

server affixing the summons to the door (*Bhomshetti* v. *Umabai* (1)). It is the duty of the peon to take some pains to find out the person to be served, so that, if possible, personal service may be effected.

1897 DEC. 10. — APPELLATE CIVIL. — 21 M. 419.

We must set aside the decree and direct that the Subordinate Judge do restore the suit to his file and dispose of it according to law. Costs will abide and follow the result.

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**21 M. 421 = 8 M.L.J. 74.**

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Benson.*

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RAMAKISSOOR DOSSJI (*Defendant No.* 3), *Appellant v.* SRIRANGA CHARLU AND ANOTHER (*Plaintiffs*), *Respondents.**
[17th January, 1898.]

*Civil Procedure Code—Act XIV of* 1882, *Sections* 2, 588—*Religious Endowments Act—Act XX of* 1863, *Section* 18—*Order for payment of plaintiffs' costs out of the funds of the institution—Appeal on behalf of the institution.*

A suit having been instituted under Religious Endowments Act, 1863, Section 14 *bona fide* in the interests of a Hindu temple, the plaintiffs desired to withdraw the suit with liberty to sue again and an order was made permitting them to do so and directing that the costs be paid from the funds of the institution:

*Held*, that no appeal lay against the order as to costs.

APPEAL against the order of E. J. Sewell, District Judge of North Arcot, on miscellaneous petition No. 349 of 1896.

The order appealed against was an order permitting the withdrawal of original suit No. 3 of 1892 and gave liberty to the [422] plaintiff to file a fresh suit and directed that the plaintiffs' costs be paid out of the funds of the Tirumalai and Tirupati devastanams, of which the first defendant had been, and the second defendant at the time of the suit was, the mahant. The suit was one brought under Religious Endowments Act XX of 1863, Section 14, and the Judge considered that it had been brought *bona fide* in the interests of the devastanams. The order relating to costs was made under Section 18 of that Act. The third defendant, who had been brought on to the record pending the suit on the death of the second, appealed against the order so far as it related to costs.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*), *Sadagopachariar* and *Gopalasami Ayyangar*, for appellant.

*Sundara Ayyar*, for respondents.

## JUDGMENT.

The order of the District Judge as to costs is not a "decree" within the definition of that word in Section 2, Civil Procedure Code, nor is the order one of those enumerated in Section 588, Civil Procedure Code, as subject to appeal. No appeal therefore lies (*Jogodindro Nath* v. *Sarut Sunduri Debi*(2)).

We dismiss the petition with costs.

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* Appeal against Order No. 158 of 1897.

(1) 21 B. 223. (2) 18 C. 322.

1898
FEB. 1.

APPEL-LATE CIVIL.

21 M. 422.

21 M. 422.

## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Davies.*

### REFERENCE UNDER STAMP ACT, SECTION 46.*

[1st February, 1898.]

*Stamp Act—Act I of* 1879, *Section* 3 (9), (19)—*Settlement—Gift—Conveyance.*

An instrument whereby a life interest in lands created with remainder to the settlor and his heirs is a settlement within the meaning of the Stamp Act.

A transfer of land, in pursuance of a compromise of a widow's suit for maintenance, is a conveyance and must be stamped accordingly.

CASE stated under Stamp Act, 1879, Section 46, by N. S. Brodie, Acting Secretary to the Board of Revenue.

The case was stated as follows:—

"Copies of two documents presented for registration in the Godavari district, together with their English translations, are herewith forwarded. Of these one has been treated as a gift and [423] is engrossed on a stamp of Rs. 8. It purports to have been executed by two persons in favour of their sister making over to her, for her enjoyment for life without any power of alienation, 4 acres and 67 cents of inam land valued at Rs. 800. All Government dues on the land are to be paid by her, and at her death the land is to revert to the executants or their heirs.

"The second document was executed by one Mahipala Subbayya in favour of Mahipala Atchamma, widow of Mahipala Sami, whereby the executant, in pursuance of a razinama filed in a suit for maintenance brought by the widow, makes over to her a piece of land measuring 2 acres and valued at Rs. 300 in satisfaction of her claim for maintenance with power to alienate, by way of gift or sale and subject only to the condition that no further claim for maintenance is put forward. This document has also been stamped as a gift with a stamp of the value of Rs. 3.

"The Inspector-General considers that the first of these documents should be regarded as a deed of settlement according to the ruling of the Madras High Court in *Reference under Stamp Act, Section* 46 (1). He points out, however, that in this case the property was settled on only one person and the chief requisite of a settlement as pointed out in the judgment of the same Court in *Reference under Stamp Act, Section* 46 (2), namely, the creation of separate interests in favour of several persons, is absent. The Board agrees with the Inspector-General in considering that the judgments in the two referred cases cited in this paragraph conflict with each other and is unable to decide whether the document should be regarded as a deed of gift or settlement.

"The same difficulty is experienced in dealing with the second document. According to the definition given in the Transfer of Property Act, there should be no consideration for a gift. In the case of this document the property was given away in satisfaction of a legal claim for maintenance, and it does not appear therefore to be a gift, nor is it a settlement under the ruling of the High Court in *Reference under Stamp Act, Section* 46 (2), as it does not create separate interests in favour of several persons.

* Referred Case No. 20 of 1897.

(1) Referred Case No. 5 of 1896 (unreported). (2) 7 M. 349.

"The question is one of considerable importance from the point of view of the revenue involved, as the stamp duty on a deed of settlement is half that on a deed of gift, and the Board [424] requests that a definite ruling may be obtained so as to enable registering officers to distinguish in future between gifts and settlements."

The documents in question were respectively as follows :—

*Document No.* 417 *of* 1897.—"Document executed on 9th April 1897 by Nadakuditi Venkatasivudu and Purushottam, sons of Chinna Ramachandrudu, Brahmins and inamdars of Sahapuram in favour of Ayyagari Mangamma, wife of Venkataraju, Brahmin, inamdar of Sahapuram. As you are our sister we have given you for enjoyment for life without power of alienation mirasi inam land valued Rs. 800 measuring acres 4·67 and bearing Survey No. 129B (2*a.* 1*c.*), No. 176 (0*a.* 71*c.*), and No. 178 (1*a.* 95*c.*) situated in Sahapuram, Cocanada sub-district. You may lease out the land and enjoy the profits derived therefrom from this date. You should yourself pay all Government dues every year. After your death the land should go either to us or to our heirs. . . . stamp Rupees eight."

*Document No.* 1364 *of* 1897.—"This deed made on 23rd April 1897 between Mahipala Subbaya, son of Sathiyya, Telaga, and raiyat of Arikarevulla of the one part and Mahipala Atchamma, widow of Sami deceased, Telaga of Arikarevulla living by maintenance of the other part : Whereas the said Mahipala Atchamma sued for maintenance in a Court of law, and as both parties agreed to a razinama at the intercession of mediators and presented a razinama in the Court, now in pursuance of the said razinama the said Mahipala Subbayya gives to the said Mahipala Atchamma a piece of land without trees therein measuring 2 acres worth Rs. 300 out of jirayati wet land bearing Survey No. 48 and measuring 3 acres 8 cents, situated in Chodavaram in Ramachandrapur sub-district and belonging to said Mahipala Subbayya, and the said Mahipala Atchamma is at liberty to enjoy the said land with power of alienation either of sale or gift without further disputes on the part of Mahipala Subbayya and his heirs and the said Mahipala Subbayya agrees to register the land in the name of the said Mahipala Atchamma in the revenue accounts."

Counsel were not instructed.

## JUDGMENT.

The first case is clearly distinguishable from that decided in 1884 (*Reference under Stamp Act, Section* 46 (1)), for there, [425] there was an absolute and unqualified disposition of property by way of gift. Here there was a provision merely for the life of the donee with reversion to the settlor and his heirs. We think this document (No. 417 of 1897) is a settlement within the meaning of the Stamp Act.

The other document No. 1364 of 1897 is certainly neither a settlement nor a gift. There was consideration other than that of marriage. We think it must be treated as a conveyance and stamped accordingly.

(1) 7 M. 349.

1898
MARCH 31.

APPELLATE CIVIL.

21 M. 425.

21 M. 425.

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

SIVA RAU AND OTHERS (*Defendants Nos.* 2, 4 *and* 6), *Appellants* v. VITLA BHATTA (*Plaintiff*), *Respondent.** [31st March, 1898.]

*Hindu law—Bequest to daughters—Construction of will.*

A Hindu testator died leaving three daughters. By his will he gave certain property in equal shares to his younger daughters and their descendants and disposed of the rest for the benefit of his elder daughter S and her son R as follows:—"All the remaining rent should be collected by S and her son R; "they shall, when necessary, let the land to other tenants and have it cultivated, and R shall pay the assessment and subject to the directions of his "mother shall enjoy the land and shall not in any way alienate the property." R pre-deceased S:

*Held*, that the testator's daughter took a life estate with remainder to her son, and that on her death the property passed to the heirs of the son.

[R., 27 M. 498 (503); D., 3 C.L.J. 515.]

SECOND appeal against the decree of H. G. Joseph, District Judge of South Canara, in appeal suit No. 186 of 1896, affirming the decree of U. Achutan Nayar, Subordinate Judge of South Canara, in original suit No. 24 of 1895.

The plaintiff sued as the reversioner of Saraswati Amma deceased, to recover possession of certain immoveable property in the possession of defendant No. 1, who was the widow of Saraswati Amma's son who had pre-deceased his mother. The plaintiff was [426] the son of the brother of Saraswati Amma's husband. Defendants Nos. 2 to 8 were the sisters and nephews of Saraswati Amma. The property in question formed part of the estate of one Karakal Rangappayya who died without male issue leaving him surviving Saraswati Amma, Rukmini Amma, the mother of defendants Nos. 2 to 6, and defendant No. 7, his daughters. The portion of Rangappayya's will, the construction of which was in question in the suit, was in the following terms:—

"My wife having died, and as I have grown old having attained "seventy years of age, I am to live with my daughter Saraswati and her "son Rama Bhatta, and have my welfare looked after by them; as after "my demise my daughter's son, the said Rama Bhatta, is alone liable to "perform my obsequies and the vaidika and other ceremonies that ought "to be performed yearly on account of me and my wife . . . . The "moveables are to be used and enjoyed by my eldest daughter Saraswati "and her son, the said Rama Bhatta, and neither my daughters Rukmini "and Mukamba nor their children have any right to them.

"In the immoveable property the rent of the land chitta No. 38 "called Karakal Rankappa assessed at Rs. 24-1-7 situated in Mudu "village, Bantval Magne, is 50 muras of rice, 190 cocoanuts and Rs. 3 "in cash excluding Rs. 4 set apart for ceremonies to deities. From "this at the rate of 2 muras of rice should be paid annually to purohit "Bantval Vasudeva Bhatta, and all the remaining rent should be collect- "ed by the said Saraswati and her son Rama Bhatta; they shall, when

* Second Appeal No. 211 of 1897.

1898 March 31. — Appellate Civil. — 21 M. 426.

"necessary, let the land to other tenants and have it cultivated, and "Rama Bhatta shall pay the Government assessment and subject to the "directions of his mother, shall enjoy the land and shall not in any way "alienate the right to the property."

The rest of the testator's property was given in equal shares to Rukmini Amma and defendant No. 7 and their descendants.

The Subordinate Judge held that Saraswati Amma and her son Rama Bhatta took an absolute joint estate, and that on the death of the latter Saraswati Amma became the sole owner, and that as she was married in one of the approved forms of marriage the plaintiff was her heir and he passed a decree accordingly. The District Judge affirmed his decree.

Defendants Nos. 2, 4 and 6 preferred this second appeal.

**[427]** Mr. *C. Krishnan* and *Ranga Rau*, for appellants.

*K. Narayana Rau* and *H. Narayana Rau*, for respondent.

## JUDGMENT.

One thing appears to be clear as to the intention of the testator and that is that the property should be divided and enjoyed in three shares by his three daughters and their respective descendants. It would be inconsistent with this intention to hold that each daughter was to take an ordinary daughter's estate, for in the event of any daughter dying leaving other daughters, the property would go to those other daughters instead of to the deceased daughter's descendants. Nor is the contention that each daughter was to take an absolute estate in accordance with the above intention or with certain express provisions in the will. In the first place in the case of the daughter and son before us the two are coupled together as both taking under the will, and no power of alienation is given to the daughter, while it is expressly prohibited to the son. Though this prohibition may not be valid as against the son, it is a clear indication that no absolute estate was intended to be given to the daughter. It being clear, however, that both the daughter and the son had an interest it is necessary to determine what was the nature of the interest of each. We have already shown that the mother's estate could not have been absolute. It seems to us that it was a life estate that was granted to her with remainder to her son. The provision that the son was to act under her orders with reference to the management of the property shows that his interest was subordinate to hers and was therefore not a joint interest. The view taken by PARKER, J., in *Shanteramma* v. *Sadasiva Rau* (1), that the two took as joint tenants cannot be maintained, for it was based on the decision in *Vydinada* v. *Nagammal* (2) which has since been overruled by the Privy Council (*Jogeswar Narain Deo* v. *Ram Chandra Dutt* (3)) and they were clearly not tenants-in-common as already pointed out. The fact being as we find that the daughter Saraswati took only a life estate and not an absolute one, it follows that the plaintiffs, who claim as the heirs of Saraswati, must fail. In our view the persons entitled to the property are the heirs of Rama Bhatta her son, who has left a widow surviving. We must therefore allow the appeal, and as against the appellants who are the **[428]** defendants Nos. 2, 4 and 6, we reverse the decrees of the Lower Courts and direct that the suit be dismissed. In the circumstances we make no order as to costs.

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(1) Appeal against Appellate Order No. 16 of 1889 (unreported).
(2) 11 M. 258.
(3) 23 C. 670=23 I.A. 37.

1898 JULY 15.

APPELLATE CRIMINAL.

21 M. 428 = 1 Weir 792.

21 M. 428 = 1 Weir 792.

## APPELLATE CRIMINAL.

*Before Mr. Justice Davies and Mr. Justice Moore.*

QUEEN-EMPRESS *v.* TIRUVENGADA MUDALI.*
[15th July, 1898.]

*Local Boards Act (Madras)—Act V of* 1884, *Section* 43—*Public servant—Sanitary Inspector.*

A Sanitary Inspector appointed by the local board is a public servant within the meaning of Local Boards Act, Madras, 1884, Section 43.

CASE submitted, for orders of the High Court, under Criminal Procedure Code, Section 438, by J. K. Batten, Acting District Magistrate of North Arcot, in Calendar Cases Nos. 245 and 246 on the file of the Second-class Magistrate of Arni.

The Sanitary Inspector of Arni having been obstructed in the discharge of his duties prosecuted the person who obstructed him under Indian Penal Code, Section 188. The Sub-Magistrate held that the Sanitary Inspector was not a public servant and acquitted the accused. The Sub-Magistrate gave his reasons for his opinion as follows :—

"The question is whether the Sanitary Inspector of any union or " panchayat is a public servant or not, for the purpose of Indian Penal " Code. I consider that he is not, and the Deputy Magistrate is of " opinion that he is.

" The reasons for my considering him not to be a public servant are " that he is not entrusted with the duty of collection of any tax, toll or " fee as required by Section 43 of Local Boards Act and Section 21, " Clause 10, of the Indian Penal Code.

" Section 43 of Local Boards Act runs as follows :—

**[429]** " 'Every member or servant of a local board, or of a panchayat, " ' every contractor or agent, to whom the collection of any tax, &c., is " ' entrusted, &c., shall be deemed to be a public servant, &c.'

" In the above I beg respectfully to call your attention to the punctua- " tion in the section. If the construction put in by the Deputy Collector " is right, I think there is no necessity for the comma after the word " 'agent.'

" Clause 10, Section 21, of the Indian Penal Code, says that every " officer whose duty it is, &c., to levy any rate or tax for any secular " common purpose of any village, &c., is a public servant.

" If my interpretation of Section 43 of Local Boards Act is not " correct, I beg to submit that this clause cannot be read in consonance " with that section and seems to me to be meaningless."

The District Magistrate in making the reference said :—" The Sub- " Magistrate contends that a Sanitary Inspector of a union, who is " undoubtedly the servant of a panchayat, is not a public servant. In " Section 43 of Madras Act V of 1884, the words 'to whom . . . . is " 'entrusted' do not appear to refer to 'every member or servant of a local " ' board or of a panchayat,' but only to 'every contractor or agent.' Every " member or servant of a panchayat should, it would appear, be deemed a

* Criminal Revision Cases Nos. 119 and 120 of 1898.

"public servant within the meaning of the Indian Penal Code, irrespective "of his duties." 1898 JULY 15. — APPELLATE CRIMINAL. — 21 M. 428 = 1 Weir 792.

The Public Prosecutor (Mr. *E. B. Powel*), for the Crown.

The accused was not represented.

## JUDGMENT.

We consider that the words " to whom the collection, &c., is entrusted" govern only the words "contractor or agent" immediately preceding them. The introduction of the distributive word "every" before "contractor or agent" shows that the intention of the legislature was to separate or distinguish these persons from the previous class of persons, *viz.*, members and servants of the board.

We, therefore, hold that the Sanitary Inspector appointed by the local board is a public servant within the meaning of Section 43 of the Local Boards Act V of 1884.

The orders of acquittal are accordingly set aside, and the Magistrate will replace the cases on his file and dispose of them on the merits.

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**21 M. 430 = 1 Weir 880.**

## [430] APPELLATE CRIMINAL.

*Before Mr. Justice Shephard (Officiating Chief Justice).*

QUEEN-EMPRESS *v.* RAMALINGAM.*
[15th, 25th and 29th July, 1898.]

*Reformatory Schools Act—Act VIII of* 1897, *Section* 8—*Reformatory Schools Act—Act V of* 1876, *Section* 22—*Period of detention in reformatory—Rules under Act of* 1876.

*Held* by SHEPHARD, OFFG. C.J., affirming the judgment of MOORE, J. (DAVIES, J., *diss.*) that the rules made by Government under Act V of 1876 must be deemed to have been made under Act VIII of 1897; and that Magistrates acting under Act VIII of 1897 must order the detention of a juvenile offender until he attains the age of eighteen.

[R., 21 A. 391 (399) = A.W.N. (1899) 138.]

PETITION under Criminal Procedure Code, Sections 435 and 439, praying the High Court to revise the proceedings of S. M. V. Woosman Sahib, Deputy Magistrate of Salem, in Calendar Case No. 70 of 1897.

The petitions were preferred on behalf of the Crown by the Public Prosecutor.

The grounds of the petition were as follows:—

"(1) The Deputy Magistrate was wrong in limiting the detention of "the accused in the reformatory school to three years.

"(2) Under the terms of the notification, dated 30th June 1887, "No. 1076, framed by the Governor-General in Council under Section 22 "of Act V of 1876, which rule by virtue of sub-Section (ii) of Section 2 of "Act VIII of 1897 is still in force, the boy should have been sent to a "reformatory for a period of five years unless he shall sooner attain the "age of 18 years.

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* Criminal Revision Cases Nos. 124, 138 and 141 of 1898.

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"(3) The Deputy Magistrate having fixed the boy's age at 14 years, "the period of detention should have been for at least four years, *i.e.*, "until he attains the age of 18 years."

The Public Prosecutor (Mr. *E. B. Powell*), for the Crown.

The accused was not represented.

These cases first came on for hearing before DAVIES and MOORE, JJ., who delivered the following judgments:—

MOORE, J.—These are applications made to us by the Government Pleader to revise the orders of certain Magistrates passed under Section 8, Act VIII of 1897. In the case dealt with in Criminal Revision Case No. 124, the Deputy Magistrate of Salem [431] has sent a boy of 14 years of age to the Chingleput refomatory for three years. In Criminal Revision Case No. 138, the District Magistrate of Tanjore finds that a boy is 13 years of age and directs that he be detained for four years and six months, and in the case brought to notice in Criminal Revision Case No. 141 he has passed a similar order.

These orders have been passed since the introduction of Act VIII of 1897 and are legal under the wording of Section 8 of that Act if that section stood alone. The Government Pleader, however, draws attention to a notification of the Government of India No. 1076, under date the 30th June 1887, promulgated under Section 22, Act V of 1876, and urges that, under the terms of this notification, the Magistrates were bound to order the detention of these juveniles till they attained the age of 18. The question that arises for decision is, therefore, as to whether this notification can be held to be still in force.

Rules under Section 22 of Act V of 1876 are directed to be made by the Governor-General in Council, while under Section 8, Clause 3 of the present Act, the duty of framing such rules is entrusted to the local Governments. The Government of Madras, in an order (G.O., No. 934, Judicial, of the 2nd July 1897), which has been brought to our notice by the Government Pleader, has observed that the operation of the rules framed by the Government of India under Section 22 of the former Act has been "saved" by sub-Section 2 of Section 2 of the present Act and has decided that it is not necessary to frame new rules.

Section 2, Act VIII of 1897, repeals Act V of 1876, but goes on to provide that all rules made under the old Act shall, as far as may be, be deemed to have been made under the present Act, and the question therefore for decision is as to whether the rule relied on by the Government Pleader can be held to be still in force. This question must, in my opinion, be decided in the affirmative. The words, *as far as may be*, in Section 2 of the Act of 1897 must, I consider, be interpreted as meaning "in so far as the rules are not inconsistent with the provisions of the new Act." Under Section 7 of the old Act a juvenile could be sent to a reformatory for a period of not less than two years, and not more than seven years. Under Section 8 of the present Act the limits prescribed are not less than three or more than seven years. The rule, therefore, passed under the old Act that a boy over ten should [432] be confined for a period of not less than five years with the proviso that he must not be detained after the age of 18, is not inconsistent with the provisions of the present Act, and such being the case we are, I consider, bound to follow it.

For the foregoing reasons I would revise these sentences as follows:—

In Criminal Revision Case No. 124 the order should be that the boy be detained for four years from the date of the Magistrate's order unless he

shall sooner attain the age of 18, and in the other two cases the sentences should be that the boys be detained for five years from the dates of the Magistrate's order with a similar proviso.

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DAVIES, J.—The facts are fully set forth in my learned colleague's order. There can be no doubt that the Legislature intended, owing probably to the varying conditions of the several provinces of the Empire, that the rules "for regulating the periods for which youthful "offenders should be sent to" the reformatory schools "according to their ages or other considerations" should, in future, be made by the Local Government [see Clause (3) of Section 8 of Act VIII of 1897] instead of by the Governor-General in Council as heretofore under Section 22 of the old Act (V of 1876).

It seems to me that the saving clause in Section 2 of the present Act could never have been meant to frustrate that intention and to absolve the Local Government from undertaking the statutory duty cast upon it. The word "as far as may be" do not, I think, go as far as that. It is understood that the Local Government has made no rules under the provision quoted. The orders in revision cannot, therefore, be contrary thereto, and as they are not opposed to anything in Section 8 itself, there is, in my opinion, no ground for our interference, and I would dismiss the petitions.

Owing, however, to the difference of opinion between Mr. Justice Moore and myself, the matter should be referred to a third Judge.

These cases then came on for hearing under Criminal Procedure Code, Section 429, before the Officiating Chief Justice who delivered the following

## JUDGMENT.

There seems to me to be no doubt that the rules, though passed under the old Act, must be deemed to have been passed under the existing Act. The orders must be amended so as to make the detention last till the offender in each case has attained the age of eighteen.

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## [433] APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Shephard (Officiating Chief Justice), Mr. Justice Davies and Mr. Justice Moore.*

*In Letters Patent Appeal No.* 6 *of* 1897 :—

THEIVU PANDITHAN AND ANOTHER (*Plaintiffs*), *Appellants v.* SECRETARY OF STATE FOR INDIA (*Defendant No.* 1), *Respondent.*

*In Letters Patent Appeal No.* 7 *of* 1897 :—

THEIVU PANDITHAN AND ANOTHER (*Plaintiffs*), *Appellants v.* CHINNAKANNU PILLAI AND OTHERS (*Defendants Nos.* 2 *to* 5, 10, 12 *to* 17, 19 *to* 21, *and Representatives of Defendant No.* 8), *Respondents.** [1st and 5th April and 7th September, 1897, and 20th and 21st July and 10th August, 1898.]

*Tree pattadar—Right to land on which trees stand.*

*Held, per* DAVIES and MOORE, JJ., affirming the judgment of BENSON J. (SUBRAMANIA AYYAR, J., *diss.*), that persons holding a patta for palmyra trees in Tinnevelly are not, *ipso facto*, entitled to an ordinary raiyatwari patta for the land on which the trees stand.

*Per* SUBRAMANIA AYYAR, J.—Land on which a man plants a palmyra tope is in his exclusive occupancy and possession as a raiyat of Government, subject to his liability to pay any assessment or assessments which the Government may from time to time be entitled to impose and subject also to all other lawful incidents attaching to a holding of that description.

The rights of a tree-pattadar and the nature of the revenue levied on such pattadars considered.

[R., 36 M. 148 (149) = 22 M.L.J. 201 (203) = 10 M.L.T. 488 = (1911) 2 M.W.N. 532.]

SECOND appeals (Nos. 158 and 159 of 1895) against the decree of S. Gopala Chariar, Subordinate Judge of Tinnevelly, in appeal suits Ncs. 264 and 289 of 1892, reversing the decree of T. Sadasiva Ayyar, District Munsif of Srivaikuntam, in original suit No. 233 of 1891.

The plaintiffs brought this suit against the Secretary of State and twenty persons, the residents of Senthamangalam village. They sought a declaration that they were entitled to receive a patta for acre 1·77, being part of a larger area described in the plaint as [434] bearing Survey No. 587-D. Of this area 43 decimals, on which a group of 33 palmyras stood, were described in the plaint as belonging to defendant No. 15. As to the rest of the land and the palmyra trees thereon, the plaintiffs claimed that their family had been in possession of a part from time immemorial and of the rest from 1856 when their father purchased it from one Picha Pillai who had had long possession. They also said that they had similarly been in enjoyment of "Valan villai land letter C, "and the palmyras. Although a patta has been granted only for the "palmyras standing on acres 2·39, made up of acres 1·85, the property "mentioned in the particulars annexed hereto and 54 decimals bearing "letter C not included in the said particulars, belonging to the plaintiffs' "ancestors as above stated, yet the plaintiffs' ancestors and the plaintiffs "have, according to the practice of this district and the revenue rules

* Letters Patent Appeals Nos. 6 and 7 of 1897.

"issued from time to time, been enjoying the land as owners, in several "modes, such as penning cattle and putting straw ricks, &c., without "assessment or patta for the land. Instead of the patta being issued as it "ought to have been done to the plaintiffs' ancestors at the time of the "settlement for the lands, on which the above-mentioned palmyras be-"longing to plaintiffs' ancestors stood, those fields and some others were "taken together, the fields of No. 587 were marked C and D and taken "(entered or measured) as immemorial waste, the letter B, situate be-"tween the said two, entered as habitation poramboke and the remainder "entered as letter A, immemorial waste, and the matter disposed of by "them (the settlement officers). Nevertheless, the plaintiffs' ancestors "who were not aware of that fact, continued to enjoy the lands. Sivoy-"jama assessment was fixed for C letter land in favour of plaintiffs' elder "brother and subsequently in Fasli 85 patta was granted (to him) and, "after his death, the patta continues to be issued in the names of plaint-"iffs."

The plaint proceeded to allege that in 1881 the plaintiffs' brother had put in a darkhast, with a view of obtaining a patta for the rest of the land to which they claimed title as above and on which their palmyras stood, that the application was opposed by some of the residents of the village on the ground that the land was required for a threshing floor, "when the plaintiffs, learning the circumstances, presented a petition on "the 12th October 1888, in which, among other reasons, they stated "that, as the building of [435] the plaintiffs' house stood on No. 590 "and some portion of No. 587 letter D, acres 1·85, on which plaintiffs' "palmyras stand and left after excluding the northern extremity of 43 cents "from the acres 2·28 of letter D, should be given only to plaintiffs and "that the said land was being enjoyed from time out of memory and up "to that date by plaintiffs' ancestors and plaintiffs. Thereupon the "Tahsildar inspected the locality, gave only the 8 cents of land contain-"ing the portion of the plaintiffs' house out of the said D letter land to "the plaintiffs, and charged the rest of the land as threshing ground poram-"boke on the 14th October 1889. On (our) preferring an appeal against "it to the Revenue Board on the 1st of January 1890, they stated that they "could not interfere. The above-mentioned land letter D has been enjoyed "by plaintiffs' ancestors, and, subsequently, by plaintiffs, from time out "of memory. It was never used as a threshing ground . . . . "As the plaintiffs' ancestors have been enjoying the plaint land for a "long time of over twelve years, by heaping straw, penning cattle, &c., "and erecting a compound, the determination thereof as threshing ground "poramboke by the Revenue authorities will not be legally valid. (Para-"graph 11.) Even if there were no clear evidence about the enjoyment "of the land under the palmyras, the legal presumption is that the said "land belongs to the palmyra pattadar and that he alone enjoys it. The "fact of plaintiffs' brother having applied by darkhast for a grant of patta "in plaintiffs' name, could not cause any diminution of the interest "possessed by the plaintiffs in the said land. Even assuming for the sake "of argument that the disputed land under the palmyras do not belong "to the plaintiffs, the Revenue authorities have no right to determine the "said land as threshing ground poramboke in accordance with the request "made unnecessarily and out of enmity by the opposite party without "granting it to plaintiffs. As the second and the subsequent number of "defendants have presented a petition to the Revenue department con-"tending that the disputed land must be for common benefit, they have

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"also been made parties herein. . . . I, therefore, pray that the "Court may be pleased to declare the plaintiffs' right to get the patta "granted in their names for the undermentioned property and to pass a "decree cancelling the order passed in reference to it, awarding such "further or other reliefs as the Court may deem fit, and directing the "defendants to pay plaintiffs' costs."

**[436]** The written statement of the Secretary of State was as follows:—

"1. The plaint land being classed as assessed waste before and after "the settlement, and now as threshing floor poramboke, is the property "of Government. The plaintiffs never held patta for it. Nor can the "alleged purchase of a portion of the land from Picha Pillai, even if true, "bind the Government.

"2. Plaintiffs' allegation in paragraph 2 of the plaint that they "enjoyed a portion of the plaint land for over sixty years is not true. "They admit in paragraph 5 that their (plaintiffs') brother applied in "1881 for the plaint lands under the darkhast rules—an admission that "the land was then Government waste. The plaintiffs encroached upon "the land only subsequently to 1886.

"3. No such legal presumption can be formed as stated in paragraph "11 of the plaint.

"4. Under these circumstances the plaintiffs have no claim to the "plaint land. The first defendant, therefore, prays that the suit be dis- "missed with costs."

The other defendants pleaded that the land was village samudayam and had long been used by the villagers "as threshing floor and path" and that the plaintiffs had no exclusive right thereto.

The following issues were framed by the District Munsif who decided them both in favour of the plaintiffs, *viz.* :—

"(1) Is the plaintiffs' alleged right to, and enjoyment of, the disputed "land true and valid as against defendants ?

"(2) Have defendants other than first defendant any right of ease- "ment to the land as poramboke threshing floor ?"

The District Munsif accordingly passed a decree for the plaintiffs.

Separate appeals were preferred against this decree on behalf of the Secretary of State for India and the other defendants respectively, and the Subordinate Judge remitted the following issue to the District Munsif for a finding :—

"Whether in this district the pattadar of palmyra trees is, *ipso facto*, "the pattadar of the land underneath such trees and whether by assessing "and issuing pattas for such trees, the proprietary right of the Govern- "ment in such land ceases and determines and the pattadar becomes the "owner of the land ?"

The District Munsif's findings on this issue were as follow :—

**[437]** "The evidence, as a whole, shows that the holder of patta "palmyras on unassessed waste or of scattered trees on assessed waste "has no right as such to the land itself, unless, of course, he has had open "and adverse enjoyment of the land against the Government for more "than sixty years ; or unless the land in natham poramboke garden of not "more extensive character than is allowed ; or is terai land planted with "palmyras about which there can be no doubt from the defendants' own

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"document No. XL that the tree pattadar is also the pattadar of the "land underneath. ... ... ... ... On the evidence I find that the "pattadar of trees on assessed waste, whose holding could be enclosed "and treated in blocks or groups has, *ipso facto*, all the rights of a pattadar "of the area underneath the trees, subject to Government's right to derive "an additional revenue whenever he cultivated the land with punja crops "and to issue to him a consolidated patta for land and trees with a higher "assessment, as indicated in Government proceedings of 1872, and that "he has not merely a right of way to the trees. I might add that in this "case, if the Government is held to possess the right to transfer the land "to poramboke and allow the villagers to hold threshing floors and place "their hay stocks on the whole land, even the acknowledged right of the "tree pattadars to a right of way and to manure the foot of his trees will "be seriously interfered with."

The Subordinate Judge, on appeal, held that the plaintiffs had proved no title to the land in dispute and that the evidence did not establish any exclusive possession in the plaintiffs with an intention to appropriate the land as their own, earlier than ten years before suit, and that the holders of neighbouring lands inclusive of the plaintiffs had used the site in question as a common threshing floor from a time anterior to 1881 and he said:—" Plaintiffs have not shown that the trees were planted by them. "If the trees were granted, then they must show that the land also "was granted, which they have not. They must at least show that "the favourable rules as regards terai lands existed at the time of the "grant of the trees and applied to their case, and this too has not been "shown. Nor could there have been a grant of trees with tax in substi- "tution of the land-tax." He accordingly overruled the plaintiff's contention that a tree pattadar had a right to the land as against the Government and dismissed the suit.

Exhibit No. XXXIX which is referred to in the following judgments were certain proceedings of Government beginning **[438]** with an extract from the Minutes of Consultation, dated the 31st of May 1855, and ending with the Government Order, dated 23rd August 1872, from which the following passages are extracted:—

"There are four classes of tree-tax payers for whose cases provision "has to be made:—(1) Raiyats paying for trees on their own holdings; "(2) palmyra climbers holding Government pattas for trees in the hold- "ings of others; (3) palmyra climbers holding Government pattas for "trees in culturable waste lands; and (4) palmyra climbers holding "Government pattas for trees in unculturable sites.

"For the first class Mr. Puckle, the Collector of Tinnevelly, proposes "to fix the tax for thirty years (corresponding with the duration of the "revised settlement of the Government demand on the land now being "carried out in the district) at the present amount of the tree-tax in each "case *plus* a trifling addition for seedlings coming on, and rejecting frac- "tions of annas.

"The Government are not prepared to say that the Collector's pro- "posals in these two cases may not be the best that can be made; but it "is evident that the principle laid down by him is not maintained, and "that the settlement is an arbitrary one.

"For the second class, or holders of pattas for trees on land in the "occupation of others, Mr. Puckle would adopt the same plan of fixing

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"the existing assessment with an addition for seedlings, as the Government demand for thirty years.

"The third class, or holders of pattas for trees on Government culturable waste, includes those, interested in the great palmyra forest, which comprises sixty-eight villages. In these cases he proposes to define as far as possible, the area occupied by trees in a single holding; to assess a low rate on the land itself suitable to its specially inferior character; to determine the tree-tax as provided for classes (1) and (2); and to settle the aggregate as the Government demand on the holder for thirty years.

"Where the interests of the several tree patta-holders of this class are much involved, and also for the fourth class or holders of patta for trees on Government unculturable waste or reserved tracts, as tank banks, road sides, building sites, &c., Mr. Puckle proposes to fix the present demand for a term of ten years, being the period of growth of the seedling to a mature tree.

"The Board, after mature consideration, recommend to Government to adopt Mr. Puckle's proposals, and the Governor in Council resolves to sanction them."

**[439]** In the year after the date of this Government Order, a suit was instituted by certain tree-pattadars in Tinnevelly against the Head Assistant Collector of Tinnevelly and others. The judgment in the appeal to the District Court which resulted in the plaintiff's favour was filed in the present suit as Exhibit L, and it contained the following passages :—

"It appears that certain of the defendants having been turned out of their houses, when the land on which their houses had stood had been taken up for the railway, were granted by the Head Assistant Collector (first defendant) fresh house-sites upon a piece of land on which were growing certain palmyras. Under the orders or sanction of the Head Assistant Collector, certain of these palmyras were cut down to make way for the houses.

"The plaintiffs objected to the trees which they claimed being cut down, and on their objection being disregarded, they filed this suit against the Head Assistant Collector and the house-builders. The prayer of their plaint is for an order restraining the defendants from interfering with the land, and directing the removal of the huts, and further to recover the value of the trees cut, this last claim having been subsequently added to the plaint.

"The Head Assistant Collector (first defendant) contended that the land was not the plaintiffs' property, but Government waste land, and that the plaintiffs had a right by their pattas only to the palmyra trees and not to the land—that the plaintiffs' right to the trees was only to be used so long as the Government did not require the use of the land, and that as it now was required for building sites, the cutting down of the trees was lawful and that as the Government tax upon such trees had been deducted from the plaintiffs' patta, they had all the relief to which they were entitled. It is further urged that the plaintiffs have no right whatever to the land, since in Fasli 1270, an opportunity was offered to the raiyats to register such waste lands as they had any claim to, and the plaintiffs had then preferred no claim to the land in question nor had a patta been ever issued for it.

"The Subordinate Judge recorded two issues :—

"(1) Whether the plaint land and trees are plaintiffs', own, or the Government waste?

"(2) Whether the damages claimed in respect of the trees cut down "are correct?

[440] "Upon the first issue he found that though the land had "never been taxed, the palymras thereon had been taxed and that there "was proof of the enjoyment of these trees by the plaintiffs and their "ancestors for a long number of years and consequently he decided that "the right to both land and trees was the plaintiffs' and that the first "defendant was wrong in entering upon the land, and cutting the trees.

"Upon the second issue he found the proof of the amount of damages "vague; and hence he awarded none.

"The relief granted by the Subordinate Judge was that the defend- "ants be restricted from interfering with the trees and lands in dispute, "and that they do remove the huts or houses constructed or in course of "construction over this land.

* * * *

"From these considerations it is manifest that the plaintiffs holding "a patta for these palmyras were, *ipsō facto*, entitled to be considered "pattadars of the land, and that, if their land was necessarily required for "public purposes, the Revenue authorities had full power to acquire it "under a definite law: and hence that the first defendant had no right "arbitrarily to enter into the land, divert it to other purposes, and cut "down the plaintiffs' trees."

*Sundara Ayyar*, for appellants in Second Appeal No. 158 of 1895.

The Government Pleader (Mr. *E. B. Powell*), for respondent.

*Sundara Ayyar*, *Seshachariar* and *Srinivasa Ayyangar*, for appellants in Second Appeal No. 159 of 1895.

Mr. *N. Subramanyam* and *Ramakrishna Ayyar*, for respondents.

SUBRAMANIA AYYAR, J.—The question raised in these cases is one of considerable importance to a large class of persons who plant and grow, as they are permitted to do by the rules of the Government applicable to the Tinnevelly district, palmyra trees on assessed Government sandy tracts, which abound in some parts of the district and which, though scarcely suited for any other kind of cultivation, are well adopted for the growth of the palmyra palm. The question is when a person grows on a piece of assessed Government land such trees in sufficient numbers and fairly closely over the land, so as to form, in the language of the people accepted by the Revenue authorities themselves, a 'tope' (paragraphs 3 and 9, Extract M.C., 31st May 1855, No. 655, and paragraph 7, extract [441] from the Proceedings of the Board of Revenue, 6th May 1858, No. 1617, in Exhibit XXXIX), what right does the planter acquire in that piece of land by so planting therein? It is not the case of either party that, when one is allowed to grow such a tope, any express agree- ment is entered into between the Government and the planter with reference to the rights of the latter in the soil. The solution of the question depends upon implications arising from a few unquestionable facts connected with this kind of plantations, coupled with the conduct of the parties concerned.

To understand the matter easily, let us confine our attention, first, to so much of the land as is visibly covered by each tree in the tope. Now, by the very fact of the man being allowed to grow the trees, has not the site of each tree been virtually granted to him for plantation purposes? What the proper answer to this question should be would become at once

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apparent by putting a further question, *viz.*, suppose some of those trees or all of them are blown away or they otherwise cease to exist; would not the planter thereof or his assign be at liberty to plant other trees on the sites of the extinct ones, and go on thus planting as long as he is inclined so to act? It would be absurd to reply to this latter question in the negative, and an affirmative reply involves the conclusion that the sites of the trees which have disappeared had from the very first become vested for such plantation purposes in the planter of the dead trees. Otherwise how could he have had a right to replace them by other trees? Such being the necessary conclusion with reference to the ground visibly covered by the trees, is the case different with reference to the interspaces between the trees forming the tope? Now, of course, though on the surface of the land, the space covered by each full-grown palmyra tree does not generally exceed a few feet in circumference, yet it is scarcely necessary to add, the soil really required for the due growth of the tree is much more. Moreover, in order to promote the growth of the trees and to make them productive, it is usual for the planter of such a tope occasionally to plough up the soil lying between the trees, and in doing so, to take advantage of the ploughing to raise on the land crops of gram or other dry grain. These acts on the part of planters of topes are, of course, among the most common acts indicative of possession and of an assertion of right to land. Nay, there is one more piece of evidence in the case which is perhaps even clearer on the point: *viz.*, the almost invariable **[442]** practice on the part of planters of these topes of enclosing the lands forming the sites of the topes including, of course, the spaces between the trees. It s scarcely necessary to say that the obvious object of forming such enclosures is to assert an exclusive right to the land. While such are the principal facts concerning plantations of the description in question and the conduct of planters of topes, what has been the conduct of the Government, the other party concerned? If the contention, stated in the written statement and persisted in that, notwithstanding the existence of a palmyra tope on a piece of assessed Government land, the land is virtually unoccupied property at the disposal of Government, were well founded, one would expect Government would have taken care to have it unequivocally intimated to planters of topes that they were labouring under a serious and a very unfortunate mistake in thinking (as in the absence of such intimation they were entitled to do) that the land on which they were expending labour and money in growing the trees was in no way vested in those persons. Nobody ever thought of doing so and even the very significant practice of enclosing was not forbidden. The explanation for the course thus pursued by the Government is manifest. The Government was naturally desirous that its waste lands should be occupied and used for the purpose for which they were best fitted, *viz.*, the growth of palmyra trees, and to have told intending planters that any land taken up by them, though covered with trees grown by them, was still at the disposal of the Government, would surely have completely frustrated the beneficial end the Government had in view and practically stopped all further plantations of this description. It is not, therefore, surprising that the Government did not stir in the matter even though the precise question, now under consideration, was broadly raised and distinctly decided more than twenty years ago against the Government in original suit No. 53 of 1873 by the Subordinate Court of Tinnevelly, and the decision was upheld on appeal by the District Court, and became final (Exhibits K and L). In these circumstances, as will be seen from the observations made in the

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case of *Lord Advocate* v. *Lord Blantyre* (1) by Lord Blackburn at pages 791 and 792 and by Lord Hatherly at pages 797 and 798, the various acts mentioned above of exercise of right on the part of planters [443] of topes must be taken to be most cogent evidence against the view that the sites of such topes are unoccupied Government property, and they strongly support the contention that such sites are entirely held by the planters of topes under the Government, subject, no doubt, to all the legal incidents attaching to holdings of that kind.

The principal arguments urged in favour of the Government have now to be noticed. The main argument was based on the allegation that holders of palmyra topes in Tinnevelly pay no revenue to the Government for the occupation of the land on which the topes stand. This allegation, however, is destitute of any real foundation. To show that that is so it is necessary to advert to the system of taxation in force in Tinnevelly and to that prevailing in the other parts of the Presidency in respect of palmyra plantations, as well as to the reason for the existence of two such different systems in the Presidency.

The system in force in Tinnevelly is to collect so much per tree after it has attained a certain growth; while in almost all the other districts, Government demand is fixed solely with reference to the extent of land on which the topes stand. How and why palmyra plantations in Tinnevelly came thus to be exceptionally treated is shortly this:—Up to 1853 the system throughout the Presidency, not only in respect of palmyra plantations but also in respect of plantations of many other descriptions of valuable fruit trees, was what still prevails in Tinnevelly in the case of palmyra plantations. But that mode of assessing Goverment revenue operated so harshly on the holders of topes that large number of persons relinquished their topes to the Government and people generally refrained from planting taxable trees anew. In 1853, the Government therefore ordered the abolition of so oppressive a system of assessing revenue and directed the substitution of the system of charging on the extent of land planted with trees of various kinds including palmyra trees, assessments charged being according to 'taram' rates, *i.e.*, rates fixed for various descriptions of soils with reference to their capacity to produce grains. This order of the Government was at once carried out in Tinnevelly as well as in other districts. But about three years later the Collector of Tinnevelly submitted to the Government a representation on the subject. He pointed out that the sandy tracts in the district, on which palmyra trees were grown so plentifully, not being well suited for the cultivation of any of the important species of grains usually grown [444] in the country, the rates of assessment fixed in the case of these tracts were extremely low, while the tax fixed for palmyra trees growing thereon amounted annually to a large sum which was collected with ease, that consequently in giving effect to the Government Order of 1853, a considerable amount of revenue thus derived had been given up and that such sacrifice of revenue was altogether uncalled for inasmuch as experience had shown that, so far as this particular district was concerned, the system of taxing each tree had not in any way discouraged the industry in question.

This representation induced the Government to order the re-introduction in the District of the old form of taxation in so far as palmyra

(1) L.R. 4 A.C. 770.

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trees alone were concerned. This was done accordingly. The reason, therefore, for the existence in Tinnevelly of what since 1858 has been an exceptional mode of taxing plantations of palmyra trees, is the peculiar fitness of the soil there for such cultivation and which fitness enables the inhabitants of the locality to grow such trees with profit to themselves in spite of their having to pay a tax upon each tree. How, then, can it be said that a person that grows palmyra trees on assessed Government land in Tinnevelly does not pay for the occupation of the land? If his payment per tree is not for the use and occupation of the land forming the site of the tope, what does he make such payment for? There can be no doubt, therefore, that the payment in question is made solely for the use and occupation of the land, though in this particular instance the amount of revenue is arrived at in a mode different from that adopted with reference to similar plantations elsewhere.

In thus holding the allegation that planters of palmyra trees in Tinnevelly do not pay revenue for the occupation of lands on which such trees are grown to be unfounded—a circumstance on which much stress was laid on behalf of the respondents has not been overlooked. That circumstance is that, if on a piece of land on which a palmyra tope stands any grain also is grown by the planter, separate assessment under the head of Sivaya Jama or extra revenue is collected by the Government for the additional cultivation. The imposition of separate assessment for such additional cultivation is, however, perfectly consistent with the view that the payment per palmyra tree is equally for the use and occupation of the land. For when any grain is grown in addition to trees of that kind, the Government treats the land as used for two distinct purposes for which the State is justified in claiming **[445]** separate payments (see paragraph 6 of the Board's Proceedings, dated the 20th March 1871, No. 1206, embodied in the Government Proceedings of the 23rd August 1872, Exhibit XXXIX). It is evident, therefore, that the fact that lands on which palmyra trees are grown receive in Tinnevelly an exceptional treatment at the hands of the Government in the matter of revenue assessments, is due to the special policy pursued by the Government in the matter as already explained and not to any established notion, as was suggested on behalf of the respondents, that planters of topes containing such trees are not occupants of the sites of the topes.

The next argument urged on behalf of the respondents was rested on the nature and description of some of the entries in certain revenue accounts, and in pattas periodically issued to raiyats which latter are but extracts from one of those accounts. It is true that in those documents planters of topes are not referred to in terms as occupants of the lands containing the topes. But the reason is plain. The primary object in view in preparing these accounts is the recording of such information as is necessary for the ascertainment and collection of the revenue due to the Government by the raiyats. Now, as the amount of the liability of the raiyats who own palmyras in the district in respect of Government revenue depends, as already stated, solely on the number and age of the trees irrespective of the extent of land on which they stand, particulars connected with the former matter alone are entered in the accounts without any reference being made to the latter matter. As to the suggestion based on the character of the entries in pattas, it is scarcely necessary to say that the legal relation between the planter and the Government is not created by the grant of any specific patta, but comes into existence from his

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occupation which takes place long before what is known as a tree patta, is first issued, and which could be given only when the trees are about ten years old and fit to be assessed for revenue. Nor is it necessary to point out that the so-called land pattas but show that in cases in which such are issued, Government revenue is calculated upon the extent of the land occupied, while tree pattas show that the revenue charged for the occupation is reckoned with reference to the number of trees on the land, and consequently this distinction between the two classes of pattas has no real bearing upon the question of the nature of the right acquired by the occupation.

**[446]** Another argument on behalf of the respondents was based upon the fact that instances were to be found in which palmyra trees standing on a piece of land were entered in the revenue accounts in the name of one man, while the land itself was entered in the name of another. But such entries were explained by Mr. Puckle, a former Collector of the district, in a report submitted by him to the Revenue Board in 1871, during the progress of the present Revenue Settlement of the district, thus :—" The origin of the anomaly of a double patta is twofold; in some " cases lands already partly planted with trees have been granted by the " Collector on patta without due inquiry or priority of option being accord- " ed to the tree owners to take up the land on which the trees stood, and " in others the land-holders themselves have voluntarily resigned a per- " centage usually from one-third to one-half of the trees on their lands to " certain palmyra climbers on condition that the latter attended to the " entire stock of trees on the land, and they have further permitted these " climbers to get tree pattas made out in their names for the percentage " of trees thus resigned " (Exhibit XXXIX). Entries arising from such exceptional causes or from the others referred to in the judgments of the Lower Courts and which are similar to the second of the causes mentioned by Mr. Puckle cannot affect the validity of the conclusion already arrived at as to the nature of the interests possessed by those who plant palmyra topes on Government assessed lands.

Before leaving this point it is perhaps not superfluous to mark that it would be easy to avoid confounding the case of tree pattadars, who have become such under arrangements like those referred to by Mr. Puckle entered into with the owners of the land containing the trees, with the case of persons allowed to plant and grow topes on Government land, if one would but distinctly bear in mind the vital distinction which exists between the two cases. Now, in the former the right transferred is obviously to only specific standing trees. The grantee thereof would no doubt be entitled to enjoy them while they exist, and for that purpose to exercise over the land other rights necessary for the due enjoyment of the trees. Subject to this, the land continues to belong to the grantor of the trees. If the grantee of the trees cuts and removes them, he has no right to grow others in lieu of those cut. In short, he can no longer enter upon the land, the planter's right to which has (by the trees which had been granted away ceasing to **[447]** exist) become freed from the limitation imposed upon it by the transfer of the trees. Now, turning to the second case, the transfer there, is not of a right to standing trees but of a right to use the land without limit of time for bringing into existence new trees and this right, as has been shown before, can be nothing else but a transfer of the land itself for plantation purposes.

A further argument urged on behalf of the respondents was in effect as follows :—Suppose on a piece of Government land measuring, say an

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acre or two, a man grows on one spot therein a few palmyra trees. He is treated by the Revenue authorities as the owner of scattered trees only, and as it is conceded for the appellants that such a person does not thereby become the occupant of the whole piece of land, the planter of a tope should likewise be held not to be an occupant of the entire site of his tope. But this argument is unsound. That there is a real difference between the two cases is too plain to require lengthened discussion. In the former case it would be manifestly unreasonable to imply that by planting a few isolated trees on one little spot on the land, the planter intends to and does occupy the whole plot, capable of growing many more trees; but in the latter case the only fair and just conclusion, for reasons already stated in the early part of this judgment, is that planters of topes do possess the entire sites of the topes. Whether in a particular instance the planter holds but scattered trees without possession of the whole plot of land on some small portion of which they stand, or whether he is the planter of a tope and an occupant of the whole of the site thereof, cannot certainly be difficult to determine. It is only necessary to add that in dealing with such a question it would be well to bear in mind the following observations of Bramwell, B., made with reference to what would amount to *de facto* possession in circumstances not altogether dissimilar to what are just under consideration. The learned Baron said:—"If "there were an inclosed field and a man had turned his cattle into it, and "had locked the gate, he might well claim to have a *de facto* possession "of the whole field: but if there were an uninclosed common of a mile in "length, and he turned one horse on one end of the common, he could "not be said to have a *de facto* possession of the whole length of the "common" (*Coverdale* v. *Charlton*) (1).

**[448]** The only other argument requiring notice was that there was no distinction between the case of trees planted on poramboke and that of trees planted on assessed land. This clearly confounds well-known differences which exist with reference to the two cases. Now, the very object of classifying land as poramboke is to take it out of the category of cultivable land so as to prevent the cultivation thereof without express permission. That is why penal assessment is imposed if trees are planted on such land. That is also why the trees so planted are taken to vest entirely in the Government. But it is otherwise with reference to assessed land. For as stated in the opening part of this judgment the Revenue rules allow any one without obaining previous permission to plant upon such assessed land and recognise the planter's right to trees grown therein. No doubt if such trees die, the property is shared equally by the Government and the planter. That however is because the Government, as the owner of the melvaram right, and the planter as the owner of the kudivaram right are co-owners. (See *Venkatanarasimha Naidu* v. *Dandamudi Kotayya* (2)). Nor is this inconsistent with the rule which enables the Government to mulct a planter in a fixed sum if he improperly cuts the trees, for he thereby violates one of the implied terms of the holding and thus unquestionably commits waste.

Before concluding, however, it is necessary to say a few words with reference to a view of the case which I have hitherto refrained from considering. The view in question is that when under the rules of the district a man plants palmyra trees on a given piece of land so as to form a tope

(1) L.R. 4 Q.B.D. 104 at p. 118. (2) 20 M. 299.

he does so subject to the Government being at liberty to allow another man to occupy and use the same land for purposes not detrimental to the rights of the palmyra planter. This view, no doubt, is not absolutely inconceivable. But it is difficult to believe that any of the parties concerned could have intended such a state of things to be for a moment possible. First, as to the palmyra planters I do not at all believe that they thought that anybody else could hold possession of the land simultaneously with them. Secondly, as appears from its own orders filed as exhibits here, the Government was strongly and consistently opposed to the anomalous practice of issuing a patta for the trees standing on a plot of ground to one individual and a **[449]** patta for the plot itself to another. These same orders show that local officials were repeatedly told that it was extremely desirable by some arrangement or other to put an end to the objectionable state of things that came into existence in certain villages owing to the causes explained by Mr. Puckle in the passage already quoted. Moreover, it being admitted that the planter has the right to plant again if the existing trees die, is he to plant fresh trees on the sites on which the dead trees stood or on the land occupied by the land pattadar? In the former case it would be a costly and troublesome process to dig up and remove the roots of the dead trees which penetrate several feet under ground. Even if the roots are removed, fresh plants would not, for obvious reasons, grow so well on the spots on which the old trees stood as they would on spots not so used up. And the lands of the description in question not being so well fitted for any other kind of cultivation the Government itself would be a loser. If, on the other hand, the planter were to plant the new trees in the land occupied by the land pattadar, nothing but confusion and inconvenience to all the parties concerned would result. Take for example a not improbable illustration. After a man has planted on a plot of ground the maximum number of palmyra trees that could, consistently with the requirements of good husbandry, be planted therein, a land patta for the ground is given to another man. This land pattadar uses the spaces between the palmyra trees for growing casuarina trees and does such acts as are necessary thereto. Suppose now, the palmyra trees for some reason or other die and the palmyra planter wishes to plant again. Though he may plant on the old sites, yet he would naturally avoid using such sites. If in such circumstances he wants to plant on the portion utilised by the land pattadar, is the former to be at liberty to insist upon the latter cutting down the casuarina trees? If the palmyra planter is entitled so to insist would not that be seriously injurious to the planter of the casuarina trees and would he have taken up the land had he been aware that such would be his position? If, on the other hand, the palmyra planter is not entitled to insist as stated above, what becomes of the hypothesis that, by the introduction of the land pattadar, it was not intended to affect the rights of the palmyra planter?

Now passing from the hypothetical case to the actual case before us, let us see what the effect of the Revenue officer's order **[450]** which the appellants pray may be declared invalid would be. If it were upheld, would not the position of the appellants be worse than if only a land patta had, as supposed in the above illustration, been issued? The order in question directs that the land be classified as poramboke for a threshing floor. And since, as stated before, trees on poramboke vest in Government, is the order complained of to be treated as depriving the appellants of their right to the existing trees? Is that why in the Secretary of State's

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written statement the appellants' right to the land is denied *in toto* and the land is claimed as absolutely belonging to Government? Suppose next that the appellants' title to the existing trees is not affected by the order in question, could the appellants consistently with the classification directed by that order to be carried out and the rules relating to the cultivation of poramboke, plant in future any trees on such spots of the land as are or become hereafter available for such planting? Now as all cultivation on poramboke of any kind is strictly prohibited by the rules just referred to and as for the infringements thereof the Revenue authorities assert that they have power to impose penal assessments to any extent they please, must not the appellants refrain from growing any more trees? If on behalf of the Government it be conceded that the order does not touch either of the abovementioned rights of the appellants, what is the use of the order declaring the land to be poramboke? Even if it were taken that the appellants' right to hold the existing trees as well as the right to plant fresh ones is not prejudiced by the above order, would not the appellants be clearly subjected to material inconvenience in the enjoyment of their rights inasmuch as during the whole time the threshing operations are carried on, in order to prevent the numerous persons that resort to the land for those operations from improperly interfering with the trees and particularly the produce thereof, the appellants would be obliged to take special measures and precautions? If the order in question were right, it will be easy to suggest many other purposes for which the Revenue officials could allow such lands to be used and which though not necessarily injurious to the trees will be highly inconvenient to the planters in the cultivation and enjoyment of their trees. It is, however, unnecessary to pursue this further as a very slight consideration ought to convince one that to constitute two persons with different interests, holders of the same land—however sound such a holding may seem in theory—would [451] not and could not but result in practice in friction and dispute between the two holders. And I confess I cannot persuade myself that any body of reasonable men would have intended so highly questionable a form of holding. Certainly not the Government that has repeatedly protested against and prohibited the extension of the preposterous practice of granting the tree-patta to one man and the land-patta to another. There can be no stronger confirmation of the correctness of the above conclusion than that the extraordinary view of the holding under consideration is not only not set up in the Secretary of State's written statement, but is quite inconsistent with the plea therein raised which, as already stated, is that the land is Government property and that the appellants have no right whatever thereto.

For all the above reasons I would hold that the conclusion of the District Munsif is right, that the Subordinate Judge was in error in reversing the Munsif's decree, and that the proper view is that land on which a man plants a palmyra tope is in his exclusive occupancy and possession as a raiyat of Government subject of course to his liability to pay any assessment or assessments which the Government may from time to time be entitled to impose and subject, also to all other lawful incident attaching to a holding of this description.

I would consequently allow the appeals, reverse the decrees of the Subordinate Judge and restore the decree of the District Munsif with costs in the Lower Appellate Court and in this Court.

Benson, J.—In these cases the plaintiffs hold a patta for certain palmyra trees in Survey No. 587-D in a certain village in Tinnevelly. They

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sued for a declaration that they were *ipso facto* entitled to an ordinary raiyatwari patta for the land on which the trees stood. The first defendant is the Secretary of State for India in Council. The other defendants are certain villagers who allege that the land is used by them as a common threshing ground.

The District Munsif decided in favour of the plaintiffs, but, on appeal, the Subordinate Judge reversed the decree and dismissed the suit.

Against this dismissal the plaintiffs urge this second appeal.

In my opinion the decree of the Subordinate Judge is right.

In Tinnevelly, as in other East Coast Districts, land is classified in the Revenue accounts as—

**[452]** (1) *Nanjah* (*i.e.*) occupied irrigated land; (2) *Punjah* (*i.e.*) occupied unirrigated land; *Anathi* (*i.e.*) unoccupied waste land that is cultivable and assessed; (4) *Poramboke* (*i.e.*) unoccupied waste that is not cultivable or assessed.

For nanjah and punjah Government grants pattas to the occupiers and claims nothing more than the right to assess and levy a suitable revenue. In anathi, Government claims the proprietory right. It is called assessed waste, because it is land which at the time of settlement (which in Tinnevelly took place in 1874) the Revenue officers thought was suitable for cultivation and might be granted on patta in accordance with the rules for the grant of waste lands, and subject to the assessment which they then fixed as appropriate.

The poramboke is land required for village site, threshing floors, roads, banks of tanks, channels, &c. This is land which the Revenue officers at the settlement considered was required for these public purposes, and which should not, therefore, at any time, be granted on patta, and on which it was for this reason useless to fix any assessment.

This classification of land existed long before the settlement, but the registers and assessments were then systematically revised and correct areas, as ascertained by survey, were entered and all private claims against Government were, as far as possible, enquired into and settled.

It is to be observed that in all the East Coast Districts from very early times, Government was in the habit of granting pattas for fruit trees including palmyras growing on both anathi and poramboke. The patta might be for a single tree or for any number, and the trees might form a definite group or be scattered about anywhere in the waste. In a field with a dozen trees there might be a different pattadar for each tree or they might be all held by a single pattadar. Admittedly the pattadar had the exclusive right to the produce of the trees, but, as we shall see hereafter, he was not allowed to cut them down, and if they fell from natural causes, the Government took half the sale-proceeds if the tree was on anathi and the whole if it was on poramboke. It is conceded that in the Tinnevelly district the Government ordinarily has the proprietary title in wholly unoccupied waste land.

The land now claimed by the plaintiffs had always been classed as Government waste land (anathi) and no patta for it had ever **[453]** been issued, but the plaintiffs held a patta for certain palmyra trees on it and the plaintiffs' contention is that these trees form a definite group and that they are for this reason, the owners of the land and entitled to demand an ordinary patta for it (*i.e.*) what we may for brevity call a land-patta as opposed to a tree-patta.

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Plaintiffs never having had a patta for the land the *onus* rests on them to show that they are entitled to demand a patta.

The Government contends that the tree-patta evidences no right to the land, save such as is necessary to enable the tree-pattadar to enjoy the produce of the trees in his patta and that subject thereto the proprietary right in the land remains with the Government and may be alienated by Government to whomsoever it pleases. This is the case as it now stands before us for decision, but originally it was very different. No distinction was then made between the alleged rights of tree-pattadars whose trees formed defined groups and of those whose trees were scattered. The question first agitated before the District Munsif was largely as to the right of Government to charge an assessment on the land in addition to the tree-tax. The points which the District Munsif set before himself for determination were :—

(*a*) Whether, in the Tinnevelly district, the Revenue authorities can, while getting assessment on trees standing on assessed waste, charge assessment for the land also separately, and treat the assessment on the trees as having nothing to do with the assessment on the land, especially when the assessment obtained by taxing the trees is greater than the assessment on the land?

(*b*) Whether the pattadar who has got trees on unassessed waste and who pays a larger assessment for his trees than what is fixed for the land is also *ipso facto* entitled to the ownership of the said land, or can the Revenue authorities treat the land as at their absolute disposal subject only to right-of way in the pattadar through the land to his trees ?

The District Munsif at first decided both the questions in favour of the plaintiffs, and gave them the declaration sued for.

The Subordinate Judge, on appeal, considered that the issuss had not been correctly framed and that this led to a dearth of evidence as to the custom of the district without which it was impossible to arrive at a correct decision. He, therefore, remitted the following issue for a finding :— "Whether in this district the pattadar of [454] palmyra trees is *ipso facto* "the pattadar of the land underneath such trees and whether, by assessing "and issuing pattas for such trees, the proprietary right of the Govern- "ment in such land ceases and determines and the pattadar becomes the "owner of the land."

It will be observed that, in this issue also there is no reference to groups of trees, nor is there any suggestion that a distinction is to be drawn between them and scattered trees. In the evidence of the many additional witnesses on both sides who were examined on this issue, I find only one, and he, a wholly unimportant witness, who draws any distinction between the two cases. The witnesses were not even questioned with a view to elicit the existence of any such distinction. I think that this fact is of great importance, because it shows that no such distinction was present to the minds of the parties, their pleaders or witnesses, and that, in fact, no such distinction really exists. Yet it is on this distinction alone that the plaintiffs now rely, and ask us to give a decree in their favour. They do not now contend that they have any right to demand a patta for land on which scattered trees stand. They limit the claim to land in which the trees form a defined group. The distinction appears to have first suggested itself to the District Munsif when writing his finding on the issue remitted to him.

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He then drew a distinction between palmyra trees standing (1) on unassessed waste land, (2) in a scattered manner on assessed waste, and (3) in a definite group on assessed waste, and came to the conclusion that the holder of a tree-patta in the two former cases had, as such, no right to the land itself; but that in the third case he had such right, that is to say, that he had the same right as an ordinary land-pattadar. The idea of the distinction, though unknown to the parties, has evidently been suggested by certain proposals made by Government in 1855 and afterwards in 1872 by Mr. Puckle at the settlement, with a view to encourage the more extensive planting of trees (see the file of papers marked Exhibit XXXIX). It was then proposed that, where trees in unoccupied lands formed a defined group or tope and were held on patta by one pattadar, the land should be assessed and a patta issued for the land, including the trees, tree-pattas, being continued only in the case of single or scattered trees. The experiment was tried in 1855 but, at the end of three years, it was abandoned, and the former system reverted to, pending the regular settlement which took place in 1874. No patta was issued for the plaint land in 1855 or at the settlement; **[455]** whether this was because the trees were regarded as only scattered trees, or whether it was because the land was used as a common threshing floor, or for some other reason, does not appear. In 1881, however, the plaintiffs' brother, who was then the manager of the family, made a darkhast or application (Exhibit III) for "the grant of the land to him for cultivation" on the ground that he was the pattadar for the palmyra trees on it; and was the adjacent landholder, and offered to pay the usual land-tax in addition to the tree-tax which he was then paying. Enquiry was made by the Revenue officials, and the application was refused on the ground that the land was used as a common threshing floor by the villagers. This application does not, of course estop the plaintiffs from setting up their present claim to ownership, but it is certainly a strong piece of evidence that their claim is an unfounded one, and that at that time the plaintiffs' predecessor in interest understood and admitted that his holding of a patta for the trees gave him no legal right to demand a land-patta, though it might give him a preferential claim in the eyes of Government if others applied for the same land. With regard to Exhibit XXXIX which contains a mass of correspondence between Government and the Board of Revenue and the Collector of Tinnevelly in 1855—58 and 1872, the important thing to note is that all through it a distinction is drawn between the trees on patta land (nanjah and punjah) and those on unoccupied waste lands, and all through there is not a single expression to indicate that these various authorities, who had special knowledge of the subject and were anxious to make rules for the benefit of the tree-pattadars, regarded the tree-pattadars in unoccupied waste as persons entitled as of right to the land beneath the trees, nor is there a single expression to show that they regarded Government as having when it issued tree-pattas given up anything more than the right to take the produce of the trees. Indeed, the right of Government as in some cases the real owner of the trees themselves, and in other cases as a kind of co-owner is constantly referred to.

Thus "in some districts large topes of palmyras, and sometimes of other kinds on totally unoccupied and waste and jungle lands, are rented out . . . . This is seen particularly . . . . in . . . . . . . Tinnevelly."—Extract of Minutes of Consultation No. 655, dated 31st May 1855. This renting out of **[456]** the topes was in some places annual and implies that they were Government property. It was to get rid of

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the necessity for renting them out that Government was then anxious. Again, the Board of Revenue in its Proceedings, No. 1617, of the 6th May 1858, paragraph 12, referring to the proposals of Government, say that the taluks where palmyras abound are not yet in a fit state for receiving the orders of Government "for forming groups of trees on unoccupied "ground into topes and giving them away to parties who agree to pay "the land-tax." Again, Mr. Puckle in his letter to the Board printed in Proceedings of Madras Government, Revenue Department, dated 23rd August 1872, says that any general application of the Government Order of 1858 "would have given away without reason millions of valuable trees." Further on he refers to "the impossibility of enforcing the right "of Government to a share in the value of every tree cut down." Lastly in paragraph 8 of Board's Proceedings, No. 3364, of the 9th August 1871, it is stated that Rs. 15,000 were derived from the felling of such trees each year.

It is important to notice this because it has been assumed by the appellants' vakil that the holder of a tree-patta must necessarily have planted the trees himself. It is notorious that palmyras and other fruit trees, such as tamarinds and mangoes, often spring up spontaneously on waste land. Defendant's twelfth witness mentions the spontaneous growth of palmyras in his enjoyment. It would seem then that the assumption that scattered trees, or even topes held under tree-pattas, must have been grown by the pattadar or his ancestors, is erroneous. In the present case the evidence does not show whether the trees, were originally grown by the plaintiffs' predecessors, or were spontaneous. The earliest patta (Exhibit H 1) shows that in 1825 the plaintiffs' father had a patta for ten palmyras only. The number had increased in 1841 (Exhibit H2) and again in 1874 (Exhibit H3) and is now 87. Probably the plaintiff planted the additional trees (though there is no evidence of this), but the trees only, not the land, are mentioned in these pattas of 1841 and 1874. The patta of 1874 contains an exact statement of the acreage and assessment of all the plaintiffs' lands, but with regard to the palmyras, no land is mentioned. The sum of Rs. 14-11-0 is merely entered at the foot of the patta as the miscellaneous tax payable for palmyras and the land on which they grow is not named or referred to in any way.

[457] Moreover, there was formerly another person who had a tree-patta in the area now in question and his interest was acquired by the plaintiffs. There was, of course, nothing in the way of an assignment by Government of any area in which the plaintiffs were to plant trees or of any agreement, express or implied, with the local Revenue officials that the plaintiffs should be allowed to plant trees in any particular area. All that we find is that the plaintiffs originally had a patta for ten trees and that the number gradually increased partly by purchase of another tree-pattadar's interest and partly by the growth of fresh trees, and that the number of such trees is now 87.

Let us now see what is the evidence as to the rights which are locally understood to belong to the tree-pattadar as such. The District Munsif did not attach much weight to the oral evidence on either side, with the exception of that given by Mr. Krishnayyar (sixth defence witness), the Tahsildar of Tenkarai, where the lands are situated. Both the Lower Courts regarded him as a thoroughly competent and trustworthy witness. As Sub-Division Sheristadar for eight years and afterwards as a Tahsildar for twelve years, he had special knowledge of the subject. This is what he

says as to the general custom of the district :—" The mere tree-pattadar is "not entitled to the land underneath the trees as of right. He is only given "a perpetual right to get patta for the land underneath the trees when "such land has been assessed waste. The Government is not bound to "issue patta to the tree-pattadar for the land underneath the trees. According to the usage prevailing in this district, Government has a right to "collect tax on palmyra trees and a separate tax on the land underneath "the trees. The land is assessed separately from the palmyra trees on it "and both taxes are recovered from the respective pattadars, if the "pattadars are separate individuals and from the same individual if he "has got patta for the land as well as the trees. If assessed waste underneath the patta trees is brought into cultivation, the land assessment is "charged to the cultivator. If the land underneath is poramboke land, prohibitory assessment is levied from the person cultivating it. The assessment charged to the cultivator of assessed waste underneath trees is "called sivayajama assessment. The land belongs to Government, though "covered with patta trees. The land is given on patta. There is no "substitution in Tinnevelly District of the palmyra tree-tax for the land-"tax and both are collected except in **[458]** the special cases of terai land. "Even in the cases of terai land, there is no substitution of the tree-tax, "but favourable rates are charged against both trees and land."

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Nothing could be plainer than this evidence and it is altogether against the plaintiffs' contentions. The only sentence that seems to support the plaintiffs is the second sentence where the witness says :—"He "(the tree-pattadar) is only given a perpetual right to get patta for the land "underneath the trees when such land has been assessed waste." This sentence must be understood in connection with the rest of the evidence in which he repeatedly states that Government is not bound to give a patta for the land. What he means is that under the rules framed by Government for the disposal of applications for grant of waste land on patta (darkhast rules) preference is given to the holder of a patta for trees on the land. This is made clear in his cross-examination where he says:—" The tree pattadar has a preferential right under darkhast rules to "get patta for the anathi land underneath the trees." In other words, the tree-pattadar has a right as against other applicants, not as against Government itself.

It has, however, been held and the decision is clearly correct, that these darkhast rules do not convey any rights enforceable against Government in the Civil Courts (*Fakir Muhammad* v. *Tirumala Chariar* (1)). Again, in the case of *Subbaraya* v. *The Sub-Collector of Chingleput* (2), TURNER, C. J., referring to the question whether the plaintiff could claim to enforce an alleged preferential right under the darkhast rules, said :—" A Civil Court cannot, however, compel the Revenue authorities "to make settlement with a particular person. In that matter the discretion of the Revenue authorities is uncontrolled."

It is necessary to bear these rulings constantly in mind, for both in the District Munsif's judgment and in the evidence of the witnesses there is a recurring confusion between rights enforceable by law against Government and so-called rights or rather preferences which Government, by its rules and practice, secures to the tree-pattadar against third persons, where both are candidates for something which Government has to give.

(1) 1 M. 205. (2) 6 M. 303 at p. 309.

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Indeed, the District Munsif in paragraphs 24 to 27 of his "finding" takes the Revenue authorities roundly to task for not [459] having "carried out speedily in an earnest spirit" what he considers was the policy of Government for the settlement of the district. Such remarks in any case would be out of place in the judgment of a District Munsif, but they are especially so in the present case where the Government is itself the defendant, and supports the action of the local Revenue authorities as being in accordance with its policy and orders.

To return, however, from this digression. The witness having stated the general rules in the language above quoted, proceeded to illustrate by six examples the kind of rights which Government had over assessed waste lands in which tree-pattas were held by private persons. The illustrations were as follows :—

"(1) For the last eight years, the Forest Department have been "enclosing as Forest Reserve Government assessed waste lands on which "palmyra trees belonging to raiyats and in the patta of raiyats are stand-"ing, merely allowing the tree-pattadars access to the trees ;

"(2) In Korkai village an embankment was constructed on Govern-"ment assessed waste on which palmyra trees of raiyats stood and no "compensation was given to the tree owners for the lands ;

"(3) Pattas have been granted by me to other than the owners of the "trees for the assessed waste underneath in several cases—but the owners "of the trees did not want the land in these cases ;

"(4) In one or two cases where the trees were held by the three or "four persons under tree-pattas and each of them applied for the whole "land underneath the trees, I have rejected the applications of all, but "one, of the tree pattadars and granted the entire land to the said one patta-"dar whom I preferred. I disposed of these applications under the dar-"khast rules ;

"(5) When patta trees are felled or fall down one-half the sale-"proceeds is taken by Government and half is given to the pattadar ;

"(6) The tree-pattadar cannot fell the trees without permission of "Government, and, if he does so, thirty years' assessment is levied from "him."

And in cross-examination he added :—"If one pattadar has ten trees "and another two trees, and the whole land underneath the twelve "trees is applied for separately by each, the land is [460] granted to "both jointly or to either of them at the discretion of the Revenue Officer "according to convenience and circumstances."

Not the slightest attempt was made to break down this evidence in cross-examination : nor strangely enough was there any attempt to call counter evidence of an independent character as to the custom or practice of the district.

The District Munsif attaches importance to the witness's statement that he was not aware of any cases in which land underneath trees held on tree-patta had been granted to any one other than the tree-pattadar when the tree-pattadar was willing to take up the land on patta, but this only shows how faithfully the Revenue authorities gave effect to the standing orders that the tree-pattadar was to have the preference in case of contest. The witness, however, says that in some cases where the tree-pattadar did not want the land patta, he had given the land patta to a stranger. Moreover, Mr. Puckle (Exhibit XXXIX) in reporting to the Board of Revenue on the origin of the anomaly by which pattas for the trees and

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the land were often held by different persons, states as the first and principal reason the fact that the Collector had granted the land pattas without due inquiry or priority of option being accorded to the tree owners. The fact that these grants of land pattas were so generally acquiesced in by the holders of pattas for trees on the land, shows that the growing of the trees, and the cultivation of crops on the land were in the opinion of the parties concerned separate rights which might be granted separately by Government, though Government preferred to grant both rights to the same person. As, however, Government by its rules gave the tree-pattadar a preferential claim to a land patta, if he desired it, it is not surprising that there are but few cases in which Government did actually grant a land patta to a third party contrary to the will of the tree pattadar. Exhibit XXIX, however, evidences a case of that kind and in Exhibit XXVII Government refused to grant a land patta to the tree pattadar who applied for it, and in many cases the Tahsildar exercised a discretion between rival applicants. A very few such instances are sufficient to show that Government retained the power to refuse a patta, though ordinarily willing to grant it. The only witness on the plaintiffs' side who gives general evidence as to the custom is their first witness who is the monigar of the village, and he distinctly says :—" Government " have right to grant the waste **[461]** land on which patta trees stand " (excepting the sites occupied by the trunks of the trees) for cultivation " to others." This was his evidence in cross-examination and no attempt was made in re-examination to explain away or minimize the force of so complete an admission of the Government case.

The witness was in no sense a hostile witness to plaintiffs. On the contrary he gave evidence stoutly in their favour in regard to the point he was called to prove, *viz.*, that the land was not a common threshing floor. There was practically no evidence adduced by the plaintiffs to contradict the evidence of this, their own witness, who, as an elderly man and monigar of the village, must know well the respective rights of Government and the tree pattadars as understood in his village. The Tahsildar of the taluk, who has had twenty years' experience in the posts where he could best gain a general or comprehensive knowledge of such rights as they are understood not merely in the village but in the wider area of the district, and whose evidence is on all hands admitted to be trustworthy, is equally distinct in favour of the Government case. As already observed no question was asked of either witness to suggest that any distinction existed between the rights of holders of pattahs for scattered trees and groups of trees. The standing orders of the Board of Revenue make no such distinction and no such distinction was made in the pleadings or issues even when the case was remanded.

The District Munsif found that the Government contention was true and correct so far as scattered trees were concerned, and there is no contention before us that the District Munsif was wrong in that finding. The evidence whether oral or documentary does not set up, much less does it establish, any distinction in regard to trees in a defined group. It follows, in my opinion, that no distinction can properly be drawn and that the plaintiffs' case fails just as much in regard to groups of trees as it does in regard to scattered trees.

In the course of the argument, I asked the appellants' vakil at what stage in the course of planting up an area of land would the holder of a patta for scattered trees on it become, *ipso facto*, entitled to a land patta.

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He could only suggest that it was as soon as the tax on the trees equalled the land-tax, but this (though at first adopted by the District Munsif) is a criterion which has nothing at all to support it. The two taxes are, as the District [462] Munsif eventually admitted, cumulative. The tax for cultivation of the land is levied in addition to the tax for the trees and without any reference to the amount of the tree-tax. If a pattadar of scattered trees has not a right to a patta for the land on which each tree grows, it is impossible to see how or at what stage as he increases the number of trees he acquires the rights of a land pattadar. No doubt as Government issues a patta for each new tree it increases the interest of the tree pattadar in the land, and diminishes the interest which remains in itself, but the interest of each party remains throughout of the same kind. The *quantum* of interest varies, but its quality does not vary. If, however, the District Munsif's distinction is to be maintained, we must hold that at some point of time the admitted limited interest of the holder of a patta for scattered trees develops *per saltum* into the wholly different kind of interest which a land pattadar possesses. Thus, in the present case, the plaintiffs had originally a patta for only ten trees. These would clearly have been regarded as scattered trees and would, according to the finding of the District Munsif and the admissions of the plaintiffs before us, carry with it no right to a land patta. The trees gradually increased in number and now it is claimed that the plaintiffs have acquired the wholly different kind of interest in the land which a land pattadar admittedly has. This seems to me an illogical conclusion and one which we cannot reasonably admit.

The District Munsif freely admitted that the plaintiffs had failed to prove the custom alleged by them or its acceptance by Government, but he held somewhat inconsistently, as it seems to me, that there was a long continued course of dealings and conduct on both sides from which an implied contract, as between landlord and tenant, might be inferred. The Subordinate Judge has carefully analysed the evidence on which the District Munsif relied and has found it to be altogether insufficient, and I have no hesitation in agreeing with the Subordinate Judge. I need not go through all the evidence, but I notice a few leading points. The District Munsif first relies on the fact that in several cases the holders of tree pattas have purported to sell the land under the trees as well as their rights in the trees. Some of these documents the Subordinate Judge has found to be not genuine, some he has found to have been executed collusively in order to get up evidence, some profess to sell the trees only, some profess to sell Government [463] poramboke land, in which it is admitted the vendors can have no right; and in all cases the transactions were behind the back of Government and were never accepted by Government officers as giving any title to the lands. It is impossible to hold that Government is bound by these transactions or that they indicate any general consciousness on the part of the community that the legal right to the land vested in the vendors. As well might it be argued that the prevalence of theft in a community was good evidence of a consciousness on the part of the community that there was no such thing as a legal right to private property. Again, the District Munsiff finds that the practice prevails of enclosing groups of trees with low mud walls and thinks that this implies an assertion of exclusive ownership. As regards this, the Subordinate Judge observes that the evidence shows that the object of the mud walls was to define the limits of the groups held by the various tree pattadars. They

were also useful for confining the goats whose manure is used for the trees, to the particular trees or groups of trees which belong to the owner of the goats. The erection of such walls is an act which does no injury to Government, and is, therefore, ordinarily not objected to by Government, but this cannot, I think, be taken to derogate from the rights of Government when it has occasion to assert them. In the case of the plaint land the evidence is that such enclosing as took place was of very recent date and was of a very temporary character. The District Munsif also relies on the fact that the tree pattadar without special permission of the Revenue authorities plants fresh trees on the land, and in due time gets a tree patta for them. This, at first sight, would seem to be a strong argument, but it loses its force when we see that a pattadar of *scattered* trees does precisely the same thing, and, in fact, a man without a tree patta at all may do it. Nay more, the plaintiffs' own twelfth witness says that this is done even in poramboke land. He says :—"Raiyats plant palmyras "even on poramboke land without Government permission and enjoy the "same. The kanakkan will enter in accounts, and then tax will be "levied." For such land a patta cannot be given, and no suggestion is made that by such planting the planter does, or can acquire a right to the land. He plants the trees with the full knowledge that he has not right to the land, but in the hope that Government will raise no objection. If the planting does no harm to the bund or channel, Government will **[464]** ordinarily, on the trees coming to maturity, give a patta for them to the planter; but this surely cannot be taken as evidence that the Government thereby admits the planter's right to the land. The patta is issued subject to locally well-known limitations. The pattadar is allowed to take the produce, but he has not even the ownership of the tree, still less, of the land. If the tree is felled or falls down, it belongs to Government. In the same way, when a holder of a tree patta plants fresh trees on Government assessed waste, he does so subject to locally well-known incidents as stated by the Tahsildar and the plaintiffs' own witness, the Village Munsif. Government will ordinarily give him a patta for the trees, but even then the trees do not belong wholly to him. If they are felled without leave, he has to pay assessment on them for thirty years. If they fall down Government gets half their sale-proceeds and the evidence shows that Government remains the owner of the land.

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I have dwelt on this matter in order to show that the rights of the parties are not to be judged by *a priori* principles, or what may seem to be *a priori* principles of natural justice, but rather by the known existing conditions which govern the relations of the parties and by the inferences which may reasonably be drawn from such known conditions with regard to other matters regarding which evidence is uncertain.

The District Munsif has, I think, been too much influenced by regard for these *a priori* principles, or, as he puts it, by "a broad view of the facts "and evidence" and by what he considers to be "for the real and permanent "benefit of both parties." He has also, I think, attached undue importance to Mr. Carr's judgment in appeal suit No. 456 of 1874 (Exhibit L) and to the fact that no appeal against it was made by Government. The Collector and the Board of Revenue, however, at once declared that the decision was incorrect, but no evidence as to the custom of the district had been given and the case was therefore thought to be an unsuitable one on which to obtain a final decision by the High Court (see Exhibit XL). The decision itself was based almost entirely on Dalyell's note on

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S.O. No. 5 of the Revenue Board. The note, not the order itself, is to the effect that in Tinnevelly the tree tax is "substituted for the land assessment instead of being an addition to it." Such a note expressed merely the opinion of the editor, and, in the absence of special knowledge on **[465]** his part, can carry but little weight with it. The statement is, in fact, incorrect, as is clear not only from the protest of Mr. Comyn, the Collector, who had special knowledge (Exhibit XL), but, what is more important, from the evidence already quoted of Mr. Krishnayyar in the present case, and from a mass of other evidence which shows that the land tax is levied in addition to the tree tax when the land under the trees is cultivated, except in the terai tract, where it may, perhaps, be correct to say that the tree tax is substituted for the land tax. The land in the present case, however, is admittedly not in the terai tract, and is not subject to the same incidents. Mr. Dalyell's note seems to have been a generalization from what he understood to be the case in the terai tract. The fact that thirty years' assessment is charged if patta trees are cut without permission is a clear indication that the tree tax is not substituted for the land tax. The two taxes are for two distinct uses of the land. The one use does not materially interfere with the other use.

If trees are planted on the land, Government charges so much for each tree for such use of the land, and, if crops are also grown on the land, it charges a separate sum on the crop so grown.

If the two uses are made by the same person, Government charges him the two taxes; if by different persons, the Government charges each according to the use made by him. Thus the permission to plant trees implied by the grant of a tree patta does not include the right to the use of the land for every purpose, and until such right has been assigned it remains in Government and can be alienated by it, provided the doing so does not derogate from the customary right of the tree-pattadar in regard to the enjoyment of the trees. Mr. Carr's decision therefore seems to me of very little importance, since it was based on an incorrect assumption and without evidence as to the custom of the district in respect of tree pattas. The only importance of the case lies in the fact that it shows that a claim similar to the present claim was made in the Courts some twenty years ago, but it is remarkable that this appears to be the only case in which such a claim has ever been made in any district though the system of tree pattas has been in existence from the earliest times in two-thirds of the districts of the Presidency. If such a claim as the plaintiffs now make was well founded, I should have expected that it would have been established by some judicial decision other than that of **[466]** Mr. Carr above referred to. The District Munsif, however, seems to think that the tree pattadar's right to "physical possession" of the land is established by the ruling of the Full Bench of this Court (*Reference under Section* 39 *of Madras Forest Act* (1)). That was a reference under the Forest Act, and the question was whether the holder of a tree patta was a "known occupier of land" within the meaning of the Forest Act, so as to entitle him to notice under Section 6, when the Government proposed to reserve as forest the land on which the trees in the patta stood. The Full Bench observed that the Collector of Salem, Mr. McWatters, who made the reference, was "of opinion that a tree patta "gives the pattadar at any rate an interest as occupier in the site on "which the tree stands," and added:—"It appears to us that the view of

(1) 12 M. 203 (207).

"the Collector is correct" . . the tree pattadar has an interest during "the continuance of his patta in the tree itself, and in all that is necessary "for the growth of the tree including the soil in which it grows. "Such interest though far inferior to the interest of the owner or lessee "of the soil, is still an interest in the land." Now the interest of an ordinary land pattadar in the land in his patta is admittedly much greater than that of a mere lessee, yet the Full Bench held that the tree pattadar's interest in the soil was "far inferior" to that of a lessee. It follows that it is still more inferior to that of a land pattadar. Moreover, the Full Bench seems to have considered that the tree pattadar's interest lasted only "during the continuance of his patta" and extended only to the sites on which the trees stood (not to the inter-spaces between trees) and so far only as was necessary for the growth of the trees. It has never been contended that the growing of crops under palmyra trees is injurious to the trees. It is rather beneficial by reason of the opening up and manuring of the soil which accompanies it. The words "during the continuance of the patta" are of importance as showing that there was no grant of a permanent right of occupancy even of the sites of the trees. If all the trees were to die or be swept away by a storm, I take it that the interest of the tree pattadar would, *ipso facto*, cease, and the land would be again absolutely at the disposal of Government. It seems to me that the observations of the Full Bench, far from supporting the **[467]** plaintiffs' claim, lead very distinctly to the conclusion that their claim is in excess of their real interest in the land. I think that those observations correctly indicate the limits of the tree pattadar's interest in the soil, and, if this is so, the plaintiffs' claim to demand a land-patta for the land must be dismissed. The mistake made by the District Munsif and by the appellants' vakil seems to be in the assumption that land on which patta trees stand must either be absolutely at the disposal of Government, or absolutely the property of the tree-pattadar. The evidence in the present case and the observations of the Full Bench show that neither of these extreme views is correct. Each party has certain rights in the land. As the number of the trees in the patta increases the *quantum* of the planter's rights increases, and the *quantum* of the Government rights which remains is diminished *pro tanto*, but the quality of the rights belonging to each party remains unaltered. If the Government has the right (as it admittedly has) to grant the spaces between scattered trees for cultivation, it has equally the right to grant for cultivation the spaces between trees forming a group, but in each case the grantee of the right to cultivate must exercise his right without infringing the pre-existing right of the tree-pattadar to enjoy the trees in the customary manner. Whether any particular act is an infringement of the right is a matter for judicial determination. It is argued that such a joint interest is, in practice, inconvenient. No doubt that is so like all joint interests, and it is in consequence of this inconvenience that Government has from time to time been anxious to give land-pattas to the holders of tree-pattas, but the existence of the inconvenience is no proof of the non-existence of the joint interest, and I can find nothing in the revenue history and practice of the district, in the evidence adduced in the case, or in the nature of things, to show that the Government is bound to grant a land-patta for land on which a group of trees is held on tree-patta.

Some expressions in the District Munsif's judgment would seem to show that he regarded the action of the Revenue authorities in refusing a

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land-patta in the present case as an act of oppression. There is no foundation for this idea. The patta was refused solely because the Revenue authorities, after due enquiry, came to the conclusion that the land had long been used by the villagers in common as a threshing floor. The same conclusion **[468]** has been arrived at by the Subordinate Judge on the evidence recorded in the case. He finds that the plaintiffs' attempt to take exclusive possession began in 1885, but that the villagers had been using it as a "public common threshing floor from a time anterior to 1881." This is a finding of fact which we must accept in second appeal and it shows that the refusal was no high handed departure from the ordinary rule which Government has made for the disposal of applications for land on which patta trees stand, but was strictly in accordance with those rules and was in the interest of the villagers generally against an attempted encroachment on their rights. I may add that the plaintiffs were granted a patta for a portion of the land on which they had (without permission) built a house with yard, &c. The patta was refused for the remainder only, but no interference with the customary enjoyment of the trees was attempted. It seems to me, therefore, that whether we look to the facts of the particular case, as found by the Subordinate Judge, or deal with the rights of the tree-pattadars in the abstract, the plaintiffs have failed to make out any case for interference on their behalf.

I would, therefore, confirm the decrees of the Subordinate Judge and dismiss the second appeals with costs.

[The judgment of Mr. Justice Benson prevailing under Section 575 of the Civil Procedure Code, the second appeals were dismissed with costs.]

The plaintiffs then appealed under Letters Patent, Section 15 ; and the appeals came on for hearing before the Officiating Chief Justice and Davies and Moore, JJ.

The parties were represented as before, and the arguments adduced for the appellants and respondents were those employed in the judgments of Subramania Ayyar, J., and Benson, J., respectively.

## JUDGMENT.

Shephard, Offg. C.J., in his judgment referred to the findings of the Subordinate Judge on the facts of the case and pointed out that the plaintiffs had failed to prove the case set up by them, and he said :—For this reason I concur in the dismissal of the second appeal, but I must not be taken to agree with the opinions expressed by my learned colleagues with regard to the rights of a tree-pattadar and the nature of the revenue levied upon such pattadars. It is admitted that plaintiffs and other persons holding tree-patta have some rights in the soil. What those rights are, **[469]** whether in the nature of a profit *a prendre* or of such nature as to entitle the pattadar to exclusive possession, must be determined upon some other occasion. In this case owing to the way in which the suit was framed and defended, the opportunity has been lost for deciding the question.

Davies, J.—Being in second appeal, we must take the facts as found by the Lower Appellate Court. Those facts are that in the Tinnevelly district, the Government grant a patta for palmyra trees exclusive of the land on which the trees grow and that, for the land, either a separate patta is granted—sometimes to the pattadar of the trees and sometimes to another person—or the land is allotted to the villagers for

communal purposes as in this case for a threshing floor, or it is not allotted at all, but kept at the disposal of the Government. The plaintiffs' claim is that they, as holders of the patta for the trees, are, *ipso facto*, entitled to the land as well. Their claim as originally laid was a claim to the whole of the unoccupied survey field in which their trees stood, although the major portion of the field was not covered by their trees. But now their claim has been narrowed down to the land immediately underneath their 87 trees which, it is said, form a 'group.' It is only by virtue of the trees forming a group that the plaintiffs lay claim to the land below, for it is conceded that the patta for a single palmyra tree or for two or three scattered trees growing in, say, an acre field, gives no right to the land. The number of trees and the degree of their relative proximity, which are necessary to constitute a group, have nowhere been defined, and this very indefiniteness is itself an indication of the shadowy nature of the plaintiffs' claim.

The one right which the plaintiffs admittedly have in connection with their right of enjoyment of the trees is the right of access to them for taking their produce and for manuring and watering them when occasion requires. A right to plant fresh trees and a right of enclosing the land on which the trees stand for its exclusive enjoyment, which right the plaintiffs also set up, they have failed to establish. Now, if the right of access to, and enjoyment of, one tree does not give a right to the land underneath it, which is admitted, a mere difference in the number of trees can make no difference in the character of the right. The plaintiffs' claim, however, seems really to be based on two other grounds. The first is that the tree-tax which they pay is a **[470]** substitution for the land-tax. There is found to be no authority for this proposition so far as the Tinnevelly district is concerned, while the history of the matter as set forth in the official correspondence filed as evidence in this case shows the exact contrary to be the case. The Collector Mr. Puckle's proposal was to consolidate the two taxes, the land-tax and the tree-tax, into one which is unmistakable proof that they were different items of revenue and not the same.

The second ground for the plaintiffs' claim would appear to be the assertion of an abstract right founded on some principle of natural justice that the owner of the trees should necessarily be the owner of the land on which they grow. But this principle is not observed in the Tinnevelly district where the actual condition of affairs often is for one person to be the owner of the land and another person to be the owner of the trees. The numerous cases that have been put in evidence prove this fact beyond a doubt. It is not contended that, in such cases, the owner of the trees could claim to be the owner of the land as against its private owner, and if the claim could not be supported against the private owner, how can it be supported against the Government? The plaintiffs have, in my opinion, entirely failed to prove the right which they assert.

What their right is has, I consider, been laid down in the Full Bench ruling of this Court (*Reference under Section* 39 *of Madras Forest Act* (1)). They have "an interest during the continuance of their patta in the tree "itself and in all that is necessary for the growth of the tree including "the soil in which it grows." This interest exists so long as the tree exists, and together with this limited and constricted right in the soil

(1) 12 M. 203 (210).

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they have an easement right-of-way to the tree over the adjoining land for the purposes mentioned before. I think the exhaustive judgment of Mr. Justice Benson, which is appealed against, is entirely right and I would confirm it and dismiss the appeal with costs.

MOORE, J.—These are appeals under the Letters Patent against the decision of Mr. Justice Benson in second appeals Nos. 158 and 159 of 1895.

The plaintiffs (appellants) have, for many years, held a tree-patta for a number of palmyras growing on Survey Field No. 587-D in the Senthamangalam village, Tenkarai taluk, Tinnevelly **[471]** district. It is admitted that a patta for the lands has never been given to the appellants, and it is shown that a few years ago the land on which these palmyra trees stood, was, under the orders of the Board of Revenue, converted into poramboke with the intention that it should be used by the villagers as a threshing floor. In their plaint the appellants pray that the Court may declare their right to get a patta for the land claimed by them and that the order transferring that land to poramboke may be cancelled.

That the Revenue authorities are not bound under the rules authorised by the Board of Revenue to grant a patta for land on which trees are standing to the holder of the tree-patta is perfectly clear. In Clause 2 of Standing Order No. 5 (printed at page 8 of the latest edition of the Board's Standing Orders), it is laid down that the issue of a tree-patta and the payment of the tree-tax entered therein conveys to the pattadar only the usufruct of the trees. The following rule is also laid down:—"In all cases "where such usufruct only is conveyed it should be noted on the patta that "the pattadar has no right to cut down the trees and a condition should be "inserted in all pattas granted in future that they are liable to be cancelled "when the land is granted on patta." The pleader for the appellants, on this order having been brought to his notice, urges that it applies to scattered trees and Government topes only and not to the trees held by the appellants. It is argued that the trees for which the appellants hold a tree-patta are not scattered trees, but a group or groups of trees and it is contended that while scattered trees may continue to be held on a tree-patta, yet when such trees by additions made to their number are formed into a group or groups of trees, the tree-patta for such group is converted into a land-patta by some obscure and unexplained process. It also appears to be maintained that, on the supposition that it is not found that the conversion of scattered trees into a group, *ipso facto*, converts a tree-patta into a land-patta, yet that it should be held that the Revenue authorities are bound to grant a land-patta for the land on which a group of trees is formed, in lieu of the tree-patta previously held. I cannot find anything that can be called evidence in support of these somewhat curious contentions. It does not appear that the Revenue authorities draw any distinction in this matter between scattered trees and groups of trees, and it is not easy to see how they could do so. Do two trees standing not far apart form a group? If not, how many trees are required before the group **[472]** can be held to have been formed? Such questions are not easy to answer. No doubt the tendency when the trees become crowded on a piece of land will be for the tree-patta to be converted into a land-patta, and it will be remembered that Clause 6 of the Standing Order already referred to provides that, whenever an application is made for waste land containing trees which are held on tree-patta, the holder of the trees is to be offered the first choice of taking the land at taram assessment and he would no doubt avail himself of this power of choice where there are a

number of trees in his patta and where consequently the amount of the tax approaches the figure of the land assessment. 1898 AUG. 10.

It further appears to be contended that even if it be held that the rules laid down in the Standing Orders of the Board to which I have referred do apply to the case of palmyra trees held on tree-pattas, as in the present case, yet that such rules must be held to be *ultra vires*, illegal and contrary to the declared intentions of Government. Such, as I understand them, are among the contentions advanced on behalf of the appellants—contentions which it must be admitted are by no means as clear as could be desired. In accepting these and similar contentions, the District Munsif seems to have especially relied on a decision of Mr. Carr as District Judge of Tinnevelly passed in 1875 (Exhibit L), an opinion expressed by Mr. McWaters, the Collector of Salem, in a case referred by him to the High Court to be found in the decision in *Reference under Section 39 of Madras Forest Act* (1) and a marginal note to No. 129 of the Standing Orders of the Board in Mr. Dalyell's edition of those orders. Mr. Carr's decision is, of course, not binding on this Court, although that officer's lengthened service in the Tinnevelly district entitles his opinion to be treated with deference. It should, however, be remembered that the then Collector, Mr. Comyn, in a letter addressed by him to the Board criticises in most adverse terms this judgment of the District Judge and that the Board also was of opinion that his decision, that the holder of a patta for trees was, *ipso facto*, to be considered the pattadar of the land, was erroneous, although it was not considered advisable for reasons given in their Proceedings No. 935 of the 15th April 1875 to appeal to the High Court. No importance can, it is clear, be attached to the expression of opinion by the Collector of Salem already mentioned.

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**[473]** The following is the note in Mr. Dalyell's edition of the Board's Standing Orders above alluded to. The first paragraph of Standing Order No. 129 runs as follows :—"When the regular assessment of the "land is paid no extra tax will be levied on trees of any kind which now "exist or may hereafter be planted." And to this order the following marginal note is added :—"Note : —The spirit of this rule is not contra- "vened by the levy of a tree-tax in Malabar, Tinnevelly, Tanjore and in "the wet taluks of Trichinopoly, for this tax is there substituted for the "land assessment instead of being an addition to it." The Subordinate Judge was of opinion that one reason why no great importance should be attached to this note was that it was no part of the substantive order, but only the view of the compiler (paragraph 29 of his judgment). No weight can, in my opinion, be attached to this argument, for the statement that in Malabar, Tinnevelly and Tanjore a tree-tax is substituted for the land assessment is to be found in Clause 2 of Standing Order No. 5 of the last edition of the Standing Orders of the Board. It does not appear to me, however, that the wording of this Standing Order and note affects the question now under consideration. What is there laid down is that when the regular land assessment is paid no extra tree-tax will be levied and it is added that the spirit of this rule is not contravened by the fact that in certain districts land assessment is calculated not with reference to the quality and character of the land as is usually done, but on the trees growing on it. The plaintiffs, however, in the present case, have been charged not land assessment, but tree-tax and have been granted not a land-patta but only a tree-patta. The general principle laid down in the old Standing Order is that

(1) 12 M. 203.

1898 AUG. 10. — FULL BENCH. — 21 M. 433 (F.B.).

separate pattas should not be granted for trees and for the land on which they stand; but there are, as is well-known in practice, many exceptions to this rule. In order No 5 in the latest edition of the Standing Orders, some of the means by which this anomaly can be done away with are set forth; but, however great that anomaly may seem to be, there can be no doubt that for years past there have been numberless cases in Tinnevelly and elsewhere where separate pattas have been granted for the trees and the land.

The only reported decision of the High Court that has been alluded to as bearing on this question is *Reference under Section* 39 **[474]** *of Madras Forest Act* (1). The point there at issue was as to whether a holder of a tree-patta was a known occupier of land within the meaning of Section 46 of the Madras Forest Act. It was held that he was a known occupier on the ground that he had, during the continuation of his patta, an interest in the tree itself and in all that was necessary for the growth of the tree including the soil on which it was growing. "Such interest," it is remarked, "though far inferior to the interest of the owner or lessee "of the soil, is still an interest in land." It is, of course, true that the holder of a tree-patta has an interest in the soil on which his tree grows, but it cannot for a moment be held that it therefore follows that he is entitled to demand a patta for the land as a matter of right.

Exhibits XXXIX and XL are sufficient to show that for many years, and indeed as far as can be seen ever since the commencement of the current century, tree-pattas have been granted in the Tinnevelly district with respect to palmyras, which give the holders no rights over the soil on which the trees are growing except in so far as is necessary for their usufruct of the trees. It is also shown that in many cases a patta for the trees is granted to one man, and a patta for the land on which they grow to another. The origin of this custom is, of course, the undisputed fact that, in parts of this district, there is land, miles in extent, on which nothing but palmyras is, or can be grown, and that, as these trees are often situated at great distances from one another and scattered over a large extent of sandy waste land, it would not pay any one to hold them if he were to be obliged to pay the taram assessment on the land on which they stand. The manner in which the anomaly of double pattas is to be gradually extinguished is set forth in Standing Order No. 5 to which I have so often referred. So long as the land remains as assessed or unassessed waste with respect to which no patta other than a tree-patta has been issued, it is still land at the disposal of Government for which it can give or refuse a land-patta as may be thought advisable.

A good deal has been said at the hearing of this appeal as to the right of the appellants to the trees growing on the land for which they claim a land-patta and of the injustice which they will **[475]** suffer if they are deprived of those trees. All that it is necessary to say as to this is that there can be no question as to the right of the appellants to the usufruct of the trees without let or hindrance, but that there is nothing to show that any one has the slightest intention of interfering with their rights in this respect. That the plaintiffs (appellants) in their plaint do not allege that there has been any such interference or state that they apprehend such is sufficient to show that no weight need be attached to the appeal *ad misericordiam* now made on their behalf. They do not ask

(1) 12 M. 203.

for a declaration of their right to the usufruct of the trees, because that right has never been denied. It cannot reasonably be doubted that, without any interference with the rights of the appellants with respect to their trees, the villagers can make use of a sufficient portion of No. 587-D as a threshing floor. As pointed out by Mr. Justice Benson at the close of his judgment, the Subordinate Judge has found as a matter of fact that the reason why the Revenue authorities refused to grant a land-patta for the land was that it had been used in common by the villagers for years as a threshing floor. If there had not been some such ground for refusal, it is only reasonable to assume that the land-patta would have been granted, the land assessment for the whole area being, of course, greater than the tree-tax on the by no means considerable number of trees on it.

On the ground that the appellants cannot claim as a right in a Civil Court to be granted a land-patta merely on the ground that they hold a tree-patta for some trees growing on the land, I would dismiss both these appeals with costs.

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**21 M. 476 (F.B.)=8 M.L.J. 154.**

## [476] APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Shephard (Officiating Chief Justice), Mr. Justice Davies and Mr. Justice Moore.*

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ARUNACHALAM CHETTI AND ANOTHER (*Plaintiff*), *Appellants v.* AYYAVAYYAN AND ANOTHER (*Defendants Nos.* 2 *and* 37), *Respondents.**

[26th August and 1st September, 1897 and 20th and 22nd July, 1898.]

*Transfer of Property Act—Act IV of* 1882, *Section* 68—*Usufructuary mortgage—Possession not given—Suit for sale.*

A usufructuary mortgagee to whom the mortgagor fails to deliver or to secure possession of the property mortgaged is not entitled to a claim in a suit for the money an order for the sale of such property.

*So held by the Full Bench* in a case where the mortgage contained no covenant to pay.

[R., 22 M. 332 (336); 6 Ind. Cas. 153; P.L.R. (1900) 178 (180); 13 Ind. Cas. 336.]

SECOND appeal against the decree of W. Dumergue, District Judge of Madura, in appeal suit No. 618 of 1895, reversing the decree of J. Solomon Gnaniyar Nadar, District Munsif of Manamadura, in original suit No. 14 of 1895.

The plaint recited a mortgage, dated 10th February 1887 and executed by defendant No. 1 in favour of Ramachandra Ayyan, which contained the following passage:—

"As I have received the sum of Rs. 400 being the total of these two "items as particularized above, you shall possess and enjoy under mort"gage the aforesaid house-site, and the pannai, varam, and nunja, punja "and samudayam lands attached to the said $\frac{5}{8}$ pangu, for a period of seven "years from this year, and further until the amount is paid. Should any "objections arise in enjoying the same, I shall myself have such objections "settled. You shall yourself pay the poruppu and quit-rent, and road "cess, due for the said pangu. I shall, at the time when the amount of

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* Second Appeal No. 1412 of 1896.

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"the said mortgage is to be paid, pay the sum of Rupees four hundred "mentioned in this mortgage deed in the month of Audi after the termi- "nation of Auni (season), and shall get back this document."

The plaint proceeded as follows :—

"The said Ramachandra Ayyan, and after his death, his son Vem- "bayyan, cultivated and enjoyed the mortgage lands for six [477] years; "and (the latter) has released ⅛ pangu in favour of the svandar out of "the said mortgage pangu ⅝, after receiving a sum of Rs. 50. The said "Vembayyan has, by a registered deed, dated 16th August 1893, trans- "ferred to plaintiff for Rs. 350 his full right under the mortgage in "respect of the lands and the samudayams, &c., attached to the same, "and of the ⅛ of the house, all of which form the remaining ½ pangu.

"As, at the time of the said transfer, the kudivaram of Arumai- "perumal Thiruthal which was a pannai attached to the said ½ pangu "had been sub-mortgaged by the said Vembayyan for Rs. 14-8-0 to Palla "Karuppan of Soodiyoor village, he (Vembayyan) allowed that sum to "remain with his consent that the sum be paid for it and the land be "redeemed, and received only the remaining sum of Rs. 335-8-0.

"Under the said right, the plaintiff is entitled to enjoy the produce "with the samudayam attached to the ½ pangu for a period of seven "years. While so, the defendants who are the svandars got possession of "the mortgage lands and house without allowing the plaintiffs to enjoy "the same, and have themselves paid the said sub-mortgage amount of "Rs. 14-8-0 and redeemed the land, and they themselves are forcibly "enjoying them. They have also written a letter to the plaintiffs stating "matters not acceptable. Their said act is unlawful.

"As now the plaintiffs do not want to enjoy the said mortgage "property, and as the period stipulated for the enjoyment of the mortgage "has elapsed, this suit is brought for obtaining a decree binding the first "defendant's undivided sons. Defendants Nos. 2 and 3 to pay the "mortgage amount together with the loss (of profit) for Fasli 1303."

The plaintiffs prayed for a decree for sale and for a personal decree against the defendants. The District Munsif passed a decree for sale in the usual form, and a personal decree against the defendants. This decree was reversed on appeal by the District Judge on the ground that the suit was not maintainable. He did not determine the first issue which was framed as follows :—

"Whether the plaint bond was void for want of consideration ?"

The plaintiffs preferred this second appeal.

*Desikachariar*, for appellants.

*Ayya Ayyar*, for respondents.

[478] This second appeal and the memorandum of objections first came on for hearing before SUBRAMANIA AYYAR and BODDAM, JJ., and their Lordships delivered judgment as follows :—

## JUDGMENT.

The Lower Appellate Court was right in holding that the instrument sued upon, which purports to be a usufructuary mortgage, contains no covenant to pay. Nevertheless as possession of the land comprised in the instrument was not given to the alleged mortgagees, this suit for the recovery of the money said to be due would lie under Section 68 of the Transfer of Property Act, if the instrument sued on represents a real transaction and is not a mere collusive document as alleged by the defendants and if the claim is not time barred.

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As to the first point the Lower Appellate Court recorded no finding. As to the latter point, that depends upon the further question whether in a case like this a decree for the sale of land could be properly given.

Before entering into the question of limitation it appears to us advisable that there should be a finding upon the question whether there was a real mortgage or whether the plaint mentioned instrument was a mere sham document. The District Judge should submit a finding upon the above question on the evidence on record.

The finding is to be returned within thirty days from the receipt of this order, and seven days will be allowed for filing objections after the finding has been posted up in this Court.

[In compliance with the above order the District Judge submitted his finding which was to the effect that the instrument sued on was a real mortgage and did not represent a sham transaction.]

This second appeal then coming on for hearing before the same Divisional Bench after the receipt of the above finding, the Court made the following order of reference to the Full Bench :—

## ORDER OF REFERENCE TO THE FULL BENCH.

The instrument sued upon being found to be not a mere sham transaction, but a real mortgage, it is necessary to decide the question of limitation. The suit is barred if the plaintiff cannot ask for a decree for sale, but is not barred, if he can. Is he then entitled to claim such relief ? According to *Samayya* v. *Nagalingam* (1) he cannot claim the relief. But a decision to the contrary was arrived in *Linga Reddi* v. *Sama Rau* (2). Of these views it is difficult to agree with the one **[479]** adopted in the former ruling. For that view of the law would sometimes lead to a practically absurd result as where a man grants a usufructuary mortgage of the only item of property he owns, but omits to deliver or fails to secure possession of the property to the mortgagee. In such a case if the mortgagee sues and obtains a decree for the money, it would in reality be useless. For under Section 99 of the Transfer of Property Act, he cannot cause the property to be sold without getting a decree for sale, and such decree he cannot get according to the view referred to. This very anomalous result could not have been intended by the Legislature. No doubt Section 67 of the Transfer of Property Act lays down that a usufructuary mortgagee as such cannot institute a suit for sale. That section, however, evidently contemplates the case of a usufructuary mortgagee in possession and enjoyment of the property mortgaged. It is true that Section 68 which refers to the case of a mortgagee who has been denied such possession and enjoyment, whilst giving a right to sue for the money says nothing about his title to an order for sale. That cannot however be held to prohibit by implication such an order being given in his case. The object of the section is to point out in what cases a mortgagee can sue for the mortgage money and not to lay down whether in so suing he can ask for the sale of the mortgaged property. This is manifest from Clause (*a*) of the section since it cannot be argued that in the case referred to therein, *viz.*, where there is a covenant to pay, no order for sale can be claimed because no reference to such an order is to be found in the section. The reason why a usufructuary mortgagee cannot ordinarily sue for the mortgage-money of course is that the parties to such a transaction intend that the money ought

(1) 15 M. 174. (2) 17 M. 469 (471, 472).

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not to be claimed so long as the mortgagee is in possession of his security. When however that consideration fails through the fault of the mortgagor, it is but just that the mortgagee should have the right to claim not only the money but also as accessory thereto an order for the realization of the money by means of that which undoubtedly was originally intended to secure its payment, though that intention was to be carried out in a different way, *i.e.*, by giving possession of the security. It is impossible to see what claim the mortgagor who is in default can have upon the consideration of the Court, so as to warrant it in declining to grant to the mortgagee, the party wronged, what in certain circumstances would be the only effective remedy, *viz.*, an order for sale.

**[480]** The following question is, therefore, referred for the decision of a Full Bench :—

Is a usufructuary mortgagee, to whom the mortgagor fails to deliver or to secure possession of the property mortgaged, entitled to claim in a suit for the money, an order for the sale of such property?

The case then came on for hearing before the Full Bench constituted as above.

*Desikachariar*, for appellants.—It is submitted that the question referred should be answered in the affirmative. [DAVIES, J.—Why did you not sue for possession? Such a suit would not be barred.] The plaintiff elected the other remedy. See Section 67 of the Transfer of Property Act. The section presupposes the continuance of the charge under the mortgage. [SHEPHARD, J.—You want to sell. Where does the Act give a usufructuary mortgagee the right to sue for sale?] It is the ordinary remedy of a charge-holder, and under Section 58 (*d*) without possession the mortgage is not usufructuary. If the mortgagor does not give possession the mortgage is not a usufructuary mortgage—but of course the mortgage lien subsists. See *Samayya* v. *Nagalingam* (1). In any view the plaintiff's position is not less that that of a charge-holder. [SHEPHARD, J.—Your security was right to possession. You have abandoned that.] I have not abandoned the security, but I do not want to be in possession. [DAVIES, J. —You want now a remedy which you could not exercise, if you had taken possession.] I have the option, if I was in possession I could not sell by reason of Section 67. [DAVIES, J.—Is it not a usufructuary mortgage under the circumstances?] Possession is necessary for that: [DAVIES, J.—What sort of mortgage is it?] It is a mortgage conferring a lien; however it is classified it is not usufructuary within the definition till possession is given. [DAVIES, J.—What kind of mortgagee are you? you must be simple or usufructuary.] Some mortgages do not come under any of the recognised classes and must be regarded as anomalous; under certain circumstances the plaintiff could not enforce the right of sale, but under the present circumstances he can, see *Linga Reddi* v. *Sama Rau*(2). When there is a covenant to pay, he could bring property to sale. [SHEPHARD, J.—You want to be in the same position as if you had **[481]** an express covenant.] In the case of a usufructuary mortgage with a covenant to pay the mortgagee is in the same position as simple mortgagee. My contention is that as possession was not given to me I am entitled to sue in the same way as if I was a simple mortgagee—See *Umda* v. *Umrao Begam* (3). *Venkatasami* v. *Subramanya* (4) and *Chathu* v. *Kunjan* (5) only apply to cases where

(1) 15 M. 174 (177). (2) 17 M. 469, (471). (3) 11 A. 367.
(4) 11 M. 88. (5) 12 M. 109.

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possession has been given. I submit the security is not taken away. As long as security remains, there is right to sell, but it is only taken away when the usufructuary mortgagee is in possession.

*Ayya Ayyar*, for respondents: referred to *Hira Lal* v. *Ghasitu* (1).

*Desikachariar* in reply: In *Hira Lal* v. *Ghasitu* (1), the mortgagees were in possession constructively through their tenants.

JUDGMENT.

Assuming that the facts of the case are such as to raise any question under Section 68 of the Transfer of Property Act, we are of opinion that the plaintiff is not entitled to institute a suit for sale.

The contention really is that at the option of the mortgagee or in the cases mentioned in Section 68, a usufructuary mortgagee is entitled to have his mortgage treated as a simple mortgage. The right to sue for sale is not provided for by the contract between the parties and is not to be found in Section 68 without doing violence to the language of the Section. In the case of *Linga Reddi* v. *Sama Rau*(2) the point now raised does not seem to have been decided. There is no hardship in the matter, for the remedy is to sue for possession of the property for which he has bargained. We answer the question in the negative.

[The second appeal coming on again for final hearing after the expression of the above opinion of the Full Bench, it was dismissed with costs.]

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**21 M. 482 (F.B.) = 8 M.L.J. 210.**

## [482] APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Shephard (Officiating Chief Justice), Mr. Justice Davies, and Mr. Justice Moore.*

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MANICKA GARAMANI AND ANOTHER (*Plaintiffs, Nos.* 2 *and* 3), *Appellants v.* RAMACHANDRA AYYAR (*Defendant*) *Respondent.**
[9th December, 1897 and 20th, and 29th July, and 31st August, 1898.]

*Rent Recovery Act* (*Madras*)—*Act VIII of* 1865, *Section* 10—*Order of ejectment—Suit to set aside such order.*

*Held*, (Davies, J., *diss.*) that a tenant who has been ejected in pursuance of an order under Rent Recovery Act (Madras), Section 10, cannot maintain a suit to question the legality of that order.

**[Appr.**, 22 M. 436; **R.**, 27 M. 401; 17 M.L.J. 129 = 2 M.L.T 106 **(F.B.)**]

SECOND appeals, against the decrees of S. Russell, District Judge of Chingleput, in appeal suits Nos. 355 to 369 of 1896, reversing the decrees of T. A. Krishnasami Ayyar, District Munsif of Chingleput, in original suits Nos. 82 to 85, and 134 to 144 of 1895, respectively.

The defendant in each of these suits was a shrotriemdar and the plaintiffs were tenants on the estate against whom orders of ejectment had been made under Rent Recovery Act, Section 10. The suits were brought to have these orders set aside.

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* Second Appeals Nos. 748 to 762 of 1897.

(1) 16 A. 318.

(2) 17 M. 469.

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The decrees of the District Munsif which were in favour of the plaintiffs were reversed on appeal by the District Judge who held that the suits were not maintainable.

The plaintiffs preferred these second appeals.

The second appeals having come on for disposal before COLLINS, C.J., and SHEPHARD, J., their Lordships made the following order of reference to the Full Bench :—

ORDER OF REFERENCE TO THE FULL BENCH.

The question is one of some importance and difficulty. There are, on the one hand, cases to the effect that an order, under Section 10 of the Rent Recovery Act is not appealable. On the other hand, there is the decision in *Ragava* v. *Rajagopal* (1) to the effect that a suit will not lie.

We refer to the Full Bench the following question, *viz.* :—

**[483]** Whether the plaintiff who has been ejected in pursuance of an order passed under Section 10 can maintain a suit to question the legality of that order.

These second appeals then came on for hearing before the Full Bench constituted as above.

Mr. *C. Krishnan*, for appellants.—The order to eject was made under Section 10 of the Rent Recovery Act. The District Munsif held the ejectment order to be illegal holding that there was no default, but the District Judge ruled on the authority of *Ragava* v. *Rajagopal* (1) that the suit would not lie. It is submitted that this ruling is erroneous. See also *Rama* v. *Tirtasami* (2), *Ramayyar* v. *Vedachaila* (3), *Gangaraju* v. *Kondireddiswami*(4) and *Rangayya Appa Rau* v. *Ratnam*(5). It is well established that there is no appeal, clearly therefore a suit lies. Compare also Sections 69 to 73 and Section 76. If the Civil Courts cannot enquire into the order there is no remedy at all. Ejectment orders were first granted under the Regulation of 1832. [SHEPHARD, J.—We need not go behind this Act.]

*Sundara Ayyar* for respondent.—Power of ejectment is expressly conferred by this Act, and is to be regulated by the special tribunal provided and there is an appeal under Section 69 against an order of ejectment under Section 10. See *Ragava* v. *Rajagopal* (1). The right to eject a tenant for failure to accept a patta was never given to a Civil Court. [MOORE, J.—Here the District Judge finds there has been an irregular order. You say there is no remedy ?] I say so here—the order of ejectment is a judgment under Section 73, and compare Sections 12, 41, 70, 71 and 72 which show how the judgments are to be executed including judgments for ejectment under Section 10, as well as for reinstatement under Section 12. [DAVIES, J.—It would seem that the Collector is the agent merely, but the ejector, is the landlord.] The Collector acts judicially ; see what he has to do under Section 10, paragraph 2. [DAVIES, J.—In adjudicating on the patta, not in issuing the subsequent order. How do you get over Section 12 which says the ejector is the landlord ?] [SHEPHARD, J.—See *Rama* v. *Tirtasami* (2).] That case is distinguishable. I cannot go to the Collector first and fail and then go to the Civil Court. Section 44 **[484]** provides for a suit by a tenant to challenge an ejectment not under

(1) 9 M. 39. (2) 7 M. 61. (3) 14 M. 441.
(4) 17 M. 106. (5) 20 M. 392.

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Section 10, but under Section 41.] [SHEPHARD, J.—It assumes the common law right to sue rather than gives it.] It permits of the suit. If no appeal is provided for expressly there is no appeal intended. Where a suit to set aside any of the orders is intended, it is given expressly—*vide* Section 32. Compare Section 44. Then read Sections 73 and 76. [SHEPHARD, J.—See Section 58.] That section means a suit does not lie. It excludes the powers of the Civil Court in all cases which are notexpressly provided for, *e.g.*, by Sections 78 and 87. Section 7 has also to be considered. The case of *Gangaraju* v. *Kondireddiswami* (1) is distinguishable, for the plaintiff sued there as owner denying the tenancy and it is doubtful whether Revenue Courts can decide whether a man is a tenant. The Judges seem to say they do not depend on the decision in *Ragava* v. *Rajagopal* (2). I rely on *Ragava* v. *Rajagopal* (2) so far as the Judges there hold that there was no suit possible; but it may be that some of the observations cannot be upheld. The learned Judges who decided *Gangaraju* v. *Kondireddiswami* (1) seem to misunderstand *Rama* v. *Tirtasami* (3), though the decision can be supported otherwise. As to *Rangayya Appa Rau* v. *Ratnam* (4), it is distinguishable for the suit was for rent—a suit allowable under Section 87. The only question was whether a particular issue was *res judicatā*. [DAVIES, J.—You admit, if the Collector acts as agent of the landlord or executive officer, a suit will lie.] Probably it would lie. [DAVIES, J.—He appears throughout to do so.] [SHEPHARD, J.—Section 73 implies that judgment and order mean the same thing.] [DAVIES, J.—Section 66 seems to say the contrary,] Sections 41 and 73 are consistent, because the first applies when there is no opposition, the latter, when there is. An order under Section 41 is appealable under Section 43. No suit will lie when a remedy is governed by a particular Act and the mode of enforcement is pointed out. See *Rāmachandra* v. *The Secretary of State* (5), a case under Madras Forest Act, 1882; *Raja Nilmoni Singh Deo Bahadur* v. *Ram Bandhu Rai* (6), under the Land Acquisition Act, 1870; see also *Bhoojunga Thakoor* v. *Luchmee Narain Sahee* (7) and *Raj Kishore* **[485]** *Mullick* v. *Brindabun Chunder Poddar* (8), and *Ramayyar* v. *Vedachalla* (9).

Mr. *C. Krishnan* in reply.—[SHEPHARD, J.—How do you get over Section 76?] The word revision refers to proceedings under Section 58 or appeals. He referred to the preamble of the Regulation repealed by Act of 1865 and *Kummarasamy Mudaliyar* v. *Nallakannu Tevan*(10), and he argued that Section 69 applied only to summary suits and that the cases relied on by the respondent were distinguishable, and that the acts and the order of the Collector in the present case were merely ministerial and not judicial.

## JUDGMENT.

SHEPHARD, OFFG. C.J.—The question we have to decide is whether a tenant, against whom a judgment has been properly passed by the collector under Section 10 of the Rent Recovery Act, can, in a separate suit in a Civil Court, call in question the order of ejectment which under the same section the Collector has passed on proof of the tenant's failure to obey the judgment.

(1) 17 M. 106. (2) 9 M. 39. (3) 7 M. 61. (4) 20 M. 392.
(5) 12 M. 105. (6) 7 C. 388. (7) 9 W. R. (C.R.), 80.
(8) 15 W.R. (C.R.), 119. (9) 14 M. 441.
(10) 5 M.H.C.R. 289 (293).

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In the case of *Ragava* v. *Rajagopal* (1) it was decided by a Divisional Bench that such a suit would not lie. Doubt has been thrown on that decision in recent cases and we have accordingly to consider whether the decision was right. Section 10 of the Rent Recovery Act gives the Collector jurisdiction to decide with regard to the propriety of any patta which the tenant to whom it has been tendered has refused to accept. The Collector has to say whether the patta tendered was a proper one, and if he holds that it was not, he has to decide in what respect it should be modified. By way of giving effect to the judgment of the Collector the section further empowers him on proof of default by the tenant to pass an order for ejecting him. It has been held with regard to this section that the jurisdiction exercised by the Collector under it can likewise be exercised by a Civil Court, except that it is not competent to the latter to amend the patta tendered and direct the acceptance of the patta so amended (*Ramayyar* v. *Vedachalla* (2)). It has also been held that the judgment given by the Collector under the section with reference to the patta of one Fasli does not conclude the parties when in a Civil Court a dispute arises between them as to the patta for [486] another Fasli (*Rama* v. *Tirtasami* (3)). The contention of the plaintiff in the present case is not supported by either of these decisions, because here what the plaintiff desires is to undo the act which an official, properly empowered in that behalf, has caused to be done to his prejudice.

The Legislature having authorised the Collector to give a judgment and to give effect to that judgment in a certain way, we are asked to say that a Civil Court may set aside the Collector's order in execution and deprive the landlord of the practical result of the judgment in his favour. This appears to me a strange proposition. It is not suggested that the judgment itself can, so far as the particular Fasli is concerned, be questioned in the suit which, if no summary suit had been brought, might have been instituted in a Civil Court. Against the judgment of the Collector, there is clearly a right of appeal to the District Court under Section 69 of the Act. But it is argued that, as no such right of appeal is given against the Collector's order of ejectment, it must be intended that this order should be examinable in a Civil Court. It is by no means clear to my mind that the judgment mentioned in Section 69 does not include the order mentioned in Section 10. It would seem from other sections of the Act that the word is not used in the limited sense which in recent times it has come to bear. But however this may be, I think we should be defeating the object of the Legislature if we held that the tenant affected by an order passed under Section 10 could obtain the reversal of that order in a Civil Court. If that had been the intention of the Legislature, one would have expected special provision to be made for it as there is in Sections 32 and 44 of the Act. The language used in Section 76 is somewhat ambiguous; but I am strongly inclined to think that section indicates the intention of the Legislature to make the judgment and order of the Collector final except in the cases specially provided for.

For these reasons, I think the decision in *Ragava* v. *Rajagopal* (1) ought to be followed. In my opinion, it is not inconsistent with *Rama* v. *Tirtasami* (3).

The facts in the more recent case, *Gangaraju* v. *Kondireddiswami* (4), are materially different from those of the present case, for the

(1) 9 M. 39. (2) 14 M. 441. (3) 7 M. 61. (4) 17 M. 106.

plaintiff claimed there to be owner and did not admit that [487] he had ever held as tenant of the defendant by whom he had been ejected. There was, therefore, a question of title raised in the civil suit, whereas here there is no such question. For these reasons, I answer the question in the negative.

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DAVIES, J.—The question referred to us is whether a plaintiff who has been ejected in pursuance of an order passed under Section 10 of the Rent Recovery Act—Madras Act VIII of 1865—can maintain a suit to question the legality of that order. I think the ruling in *Gangaraju* v. *Kondireddiswami* (1) that such a suit does lie is correct and should be followed. A suit for ejectment is one on title, and title can only be tried incidentally by the Revenue Courts as held in *Rama* v. *Tirtasami* (2), and approved of in *Gangaraju* v. *Kondireddiswami* (1). It is pointed out by the learned Judges who tried the latter case that the above point was not observed by the Judges who tried *Ragava* v. *Rajagopal* (3). Moreover, the fact is that, according to a uniform course of decisions, no appeal lies against the summary order of ejectment passed under Section 10. Appeals lie only when there has been an ejectment by the Collector in a summary suit under the Act (see *Kummarasamy Mudaliyar* v. *Nallakannu Tevan* (4)). It would seem to follow that a suit being the only remedy, a suit should be allowed. It is contended that Section 76 of the Act bars a suit; but the High Court has never yet read it in that light, or it could not have allowed the many suits that it has allowed. The section reads that "in proceedings under this Act no judgment of a Collector, and no order "passed by him after decree and relating to execution thereof, shall be open "to revision otherwise than by appeal to the Zillah Court, except as "allowed in Section 58." From the reference to Section 58 which provides for revision of certain of his own orders by the Collector, it seems to me clear that the prohibition against revision in the section applies only to revision by the Collector himself. If it had been intended that no suit should lie against any judgment or order of the Collector, express words to that effect would have been enacted.

Another reason that I would give for holding that a suit is maintainable is that an order for ejectment passed under Section 10 is, in my opinion, an order passed by the Collector not in his [438] judicial, but in his executive or ministerial capacity as the instrument or agent of the landholder. It is just in this way that the Collector acts in the other case where he issues an order of ejectment under Section 41, and also in several other instances mentioned in the Act. Section 12 confirms this view, as it treats the ejectment under Section 10 as well as that under Section 41 as an ejectment made by the landholder. But it is not worth while to discuss the question further as the present Act is happily moribund and our ruling in the present case will not be required for future guidance. So far as the present case is concerned, I would answer the question referred to us in the affirmative.

MOORE, J.—The question referred to the Full Bench for decision is the following:—"Whether the plaintiff who has been ejected in pursu-"ance of an order passed under Section 10 (Act VIII of 1865, Madras) "can maintain a suit to question the legality of that order."

(1) 17 M. 106.
(2) 7 M. 61.
(3) 9 M. 39.
(4) 5 M. H. C. R. 289 (293).

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The Madras cases referred to at the hearing are the following:— *Kummarasamy Mudaliyar* v. *Nallakannu Tevan* (1), *Rama* v. *Tirtasami* (2), *Ragava* v. *Rajagopal* (3), *Ramayyar* v. *Vedachalla* (4), *Gangaraju* v. *Kondireddiswami* (5) and *Rangayya Appa Rau* v. *Ratnam* (6). It does not appear to me to be necessary to refer to the cases from other Presidencies to which allusion has been made, as it cannot be held that they have any bearing on the question under consideration.

The decision in *Kummarasamy Mudaliyar* v. *Nallakannu Tevan* (1) throws no light on the present case as it relates to certain proceedings taken by the Civil and Revenue Courts in connection with warrants issued under Section 41 of Act VIII of 1865, Madras. The point decided in *Rama* v. *Tirtasami* (2) was that a decision in a Revenue Court directing a tenant to accept a patta for one Fasli did not bar a suit before a Civil Court in a subsequent year to determine if the rates mentioned in the patta were proper. This ruling does not affect the present case. The question at issue in *Ramayyar* v. *Vedachalla* (4) was as to whether a Civil Court could entertain a suit to enforce acceptance of patta and execution of muchalka. With this question we are not now concerned. [489] What was held in *Gangaraju* v. *Kondireddiswami* (5) was to the effect that a decision of Revenue Court that a party was bound to accept a patta for certain land was no bar to a suit subsequently brought by him in a Civil Court to declare that he was the actual owner of the land. This is is not the question now at issue. In *Rangayya Appu Rau* v. *Ratnam* (6), it appeared that in a suit before a Revenue Court it was decided that a patta was a proper one and it was held that this decision did not render the question of the propriety of the patta *res judicata* in a subsequent suit in a Civil Court. With this question we are not now concerned.

*Ragava* v. *Rajagopal* (3) remains for consideration. There, the High Court decided that a Revenue Court having ordered a tenant to be ejected under Section 10 of Act VIII of 1865, on the ground that he had refused to accept a patta, as directed by the Court, a suit would not lie in a Civil Court to set aside the order of the Revenue Court. This decision has never been overruled. *Gangaraju* v. *Kondireddiswami* (5), which the District Munsif was of opinion overruled *Ragava* v. *Rajagopal* (3), decides, as has already been pointed out, a completely different question. It is clear that if the ruling in *Ragava* v. *Rajagopal* (3) is to be followed, the answer to the question referred must be in the negative, although it should be pointed out that in that decision Mr. Justice Parker observes that it may be that a suit would lie to set aside an ejectment irregularly obtained and that in the present case the finding of the District Judge is that the proceedings in ejectment were most irregular.

I am of opinion that the question referred must be answered in the negative but for reasons different from those given in *Ragava* v. *Rajagopal* (3). The order now under consideration is an order of ejectment issued by a Revenue officer under the last clause of Section 10 in execution of the decree in a judgment passed by him. Section 76 of the Act clearly provides that no order passed by a Collector after decree relating to execution thereof shall be open to revision otherwise than by appeal to the Zilla (District) Court, except in a case which does not now arise. A good deal

(1) 5 M.H.C.R. 289 (293). (2) 7 M. 61. (3) 9 M. 39.
(4) 14 M. 441. (5) 17 M. 106. (6) 20 M. 392.

has been said at the hearing as to the meaning of the word "revision" in this section. It appears to me that this word is here used in the widest possible sense, and that the meaning of this sentence is that [490] no order of a collector in execution was to be set aside or interfered with in any way except by an appeal to the District Judge. There do not appear to me to be any grounds for supposing that by the word "revision" here the Legislature meant "revision" as provided for in Chapter XLVI of the Civil Procedure Code.

It has been stated here at the hearing of this reference that it has always been held that there is no appeal from an order passed under the last clause of Section 10. It is, however, admitted that there is no reported decision of the High Court to that effect. It is in my opinion clear that Legislature intended that there should be such an appeal. I cannot possibly hold that the meaning of Section 76 is that an order of a Collector passed in execution of a decree of his Court cannot be set aside except by an appeal to the District Judge, but that no such appeal is to be entertained. No reference to this section is made by the Judges in *Ragava* v. *Rajagopal* (1).

The view, therefore, that I take is that an order of a Collector ejecting a tenant under Section 10 is open to appeal to the District Judge, but that in view of the provisions of Section 76 of the Act it cannot be set aside otherwise, and I would accordingly answer this reference in the negative.

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**21 M. 490.**

## ORIGINAL CIVIL.

*Before Mr. Justice Boddam.*

HAJI MAHOMED ABDUL AZIZ BADSHA SAHIB AND OTHERS (*Plaintiffs*) v. SUBBA NAIDU (*Defendant*).*
[26th November, 1897.]

*Civil Procedure Code — Act XIV of* 1882, *Sections* 59, 140—*High Court Rules, Nos.* 39, 43, 44, *and* 47.

A defenant is entitled, under the High Court Rules, to be furnished with a copy of documents sued on, which are deposited with the plaint.

APPLICATION on behalf of the defendant in original suit No. 238 of 1897 to be furnished with a copy of an agreement, dated the 30th [491] of January 1895, which was filed with the plaint as being one of the documents sued on. The Deputy Registrar, Original Side, to whom the application was first made, referred the question to the Judge.

The High Court Rules (original civil jurisdiction) referred to in the judgment are as follow :—

"39. When an original document is produced by the plaintiff "under Section 59 of the Code of Civil Procedure, the same shall be "marked for identification by the record-keeper, and if, in lieu of the "original, a copy thereof is filed with the plaint, the same shall, before

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* Civil Suit No. 238 of 1897.

(1) 9 M. 39.

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"return of the original, be compared therewith by one of the examiners "who shall attest the copy if it be found correct.

"43. The list of documents prescribed by Section 140 of the Code "of Civil Procedure shall be in Form No. 7 and shall be delivered to the "Registrar, together with the documents therein mentioned at or before "the first hearing, or within such further period as may be allowed by the "Court.

"44. Copies of documents annexed to a plaint as exhibits may be "furnished to a defendant at any time after the summons to appear has "been served upon him.

"47. Until documents produced with a plaint, but not mentioned "therein or annexed thereto as exhibits, have been offered and received in "evidence, inspection thereof cannot be allowed or copies thereof furnished "to a defendant, without an order to be obtained under the following "rules."

Messrs. *Branson & Branson*, for plaintiffs.

Messrs. *Barclay, Morgan & Orr*, for defendant.

## JUDGMENT.

Section 59 of the Civil Procedure Code contemplates the production and deposit with the plaint of documents sued on, and which therefore form part of the plaint. They have to be marked under rule No. 39 of the High Court Rules and should be considered as "annexed thereto as exhibits" within rule No. 47 of the High Court Rules and may be furnished to a defendant under rule No. 44, High Court Rules. Rules Nos. 43 and 47 are intended to apply to documents deposited under Section 140, Civil Procedure Code, and inspection of these should not be allowed until they are offered and received in evidence. Let the defendant have a copy of the document in question.

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**21 M. 492.**

## [492] ORIGINAL CIVIL.

*Before Mr. Justice Shephard.*

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IN THE MATTER OF THE GOODS, CHATTELS, CREDITS OF SLADEN (DECEASED).* [10th January, 1898.]

*Evidence Act—Act I of* 1872, *Section* 85—*Power of attorney—Declaration before notary public in proof of power of attorney.*

On an application for letters of administration with the will annexed, made by the attorney of the executors therein named, it appeared that the applicant's power of attorney was not executed in the presence of a notary public; but, with regard to the execution by each of the executors, one of the attesting witnesses had made a declaration before a notary public to the effect that he witnessed the execution of the power of attorney by one of the executors, and that the signature of the other attesting witness was the proper signature of the person bearing that name, and each declaration was signed, sealed and certified by a notary public:

*Held*, that the power of attorney was sufficiently proved.

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* Testamentary Petition No. 183 of 1897.

1898 JAN. 10. — ORIGINAL CIVIL. — 21 M. 492.

PETITION for letters of administration to the estate and effects of Joseph Banks Sladen (deceased) within the jurisdiction of the High Court with his will and codicil annexed, as set forth in an exemplification of probate issued out of and under the seal of the High Court of Justice in England, to be granted to the petitioner as one of the duly constituted attorneys of the executrix and executors named in the last will and testament of the said Joseph Banks Sladen (deceased) until the said executrix or executors or one of them should obtain probate or letters of administration granted to herself or himself.

The petition set out that the said Joseph Banks Sladen had died in the State of Florida in the United States of America on or about the 14th March 1897, having made his last will and testament, bearing date the 29th day of April 1885, and by the said will appointed his wife Elizabeth Sladen and John Ramsay Sladen and Alfred Thompson Crawshay executrix and executors thereof; that on the 21st day of July 1897 probate of the said will was duly granted by the High Court of Justice in England to the said executrix and executors named in the said will as appeared by an exemplification of such probate annexed to the petition. After a statement of the property and effects of the testator [493] within the jurisdiction of the High Court, the petition proceeded to state:—

"That by a deed, poll or power of attorney under the hand and seal "of the said Elizabeth Sladen, John Ramsay Sladen and Alfred Thomp- "son Crawshay respectively, and bearing date the 23rd day of July 1897, the "said Elizabeth Sladen, John Ramsay Sladen and Alfred Thompson Craw- "shay respectively did thereby nominate, constitute and appoint Patrick "Macfadyen, Reginald James Hugh Arbuthnot, Charles Edward Patrick "Vans Agnew, John Montgomery Young and your petitioner respectively "therein described as all of Madras (India) jointly and severally to be their "lawful attorneys or attorney for the purpose of obtaining from the proper "Court or Courts, office or offices, in India, letters of administration with "copy of the said will and codicil annexed of all and singular the personal "estate and effects of the said Joseph Banks Sladen deceased there situate "or recoverable, or otherwise to procure themselves or himself to be con- "stituted either as the attorneys or attorney of the said Elizabeth Sladen, "John Ramsay Sladen and Alfred Thompson Crawshay or otherwise the "administrators or administrator of the said property or the legal repre- "sentatives or legal representative of the said testator in India; and to do "all acts which should be necessary in the performance of the premises, "but for greater certainty as to the contents of the said deed, poll or "power of attorney, your petitioner craves leave to refer to the same here- "unto annexed and marked with the letter B."

The power of attorney was not executed in the presence of a notary public, but it was sought to prove it by the declarations of attesting witnesses referred to in the judgment. The question raised was whether the power of attorney was sufficiently proved.

Messrs. *Barclay, Morgan & Orr*, for petitioner.

## JUDGMENT.

A question has been raised as to the proof of the execution of the power of attorney under which the petitioner in this matter seeks to act. The power of attorney does not purport to have been executed in the presence of a notary public or any other of the persons designated in Section 85 of the Evidence Act; but with regard to the execution by each of the

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three executors, one of the attesting witnesses has made a declaration before a notary public to the effect that he witnessed the execution of the power of attorney by one of the executors, and [494] that the signature of the other attesting witness is the proper signature of the person bearing that name. To each declaration is appended a certificate signed and sealed by the notary public. In similar circumstances it has been held in Calcutta that, inasmuch as the execution is not proved in the manner indicated in Section 85 of the Evidence Act, the application for letters of administration ought to be refused (*In the Goods of A. J. Primrose* (1)). In arriving at this decision, Mr. Justice Norris seems to have assumed that the provision contained in Section 85 is of an exhaustive character and that no other mode of proving the execution of a power of attorney is admissible. That assumption, however, is, in my opinion, not warranted by the language of the section, nor can it have been intended to exclude other legal modes of proving the fact in question, *viz.*, the execution of the power of attorney. I cannot see why the fact should not be proved by an affidavit made before a person competent to administer an oath. The Evidence Act is expressly declared not to apply to affidavits. Seeing that the declarations are made in the form prescribed by the Statute of 1835 and before officials competent to administer an oath, I am of opinion that they ought to be received as evidence of the facts therein stated. I am told that it has been the practice here, as apparently it was in Calcutta, to receive such declarations, and I cannot say that the practice is erroneous.

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**21 M. 494=8 M.L.J. 75.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.*

RATNAM AYYAR (*Petitioner*), *Appellant v.* KRISHNA DOSS VITAL DOSS (*Counter-petitioner*), *Respondent.**
[8th December, 1897, and 18th January, 1898.]

*Limitation Act—Act XV of* 1877, *Sections* 7, 19, *Schedule II*, *Article* 165—*Dispossession in execution—Application on behalf of a minor.*

Limitation Act, 1877, Schedule II, Article 165, is applicable to a case where the applicant is a party to the decree which is being executed as well as when he is a stranger.

[495] But an application made on behalf of a minor objecting to dispossession more than thirty days after it took place is not barred by limitation by reason of Limitation Act, 1877, Section 7.

[Appr., 6 O. C. 46.]

APPEAL against the order of L. C. Miller, Acting District Judge of Trichinopoly, in civil miscellaneous appeal No. 34 of 1895, affirming the order of S. A. Krishna Rau, District Munsif of Kulitalai, in miscellaneous petition No. 887 of 1895.

A decree was passed for the division of certain lands held in common by the plaintiff and defendants and for the delivery to the plaintiff of his share. The measurement of the lands took place in May 1895, and a portion was delivered to the plaintiff on the 8th. The present application

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* Appeal against Appellate Order No. 46 of 1897.

(1) 16 C. 776.

1898 JAN. 18 — APPELLATE CIVIL. — 21 M. 494 = 8 M.L.J. 75.

was presented on behalf of one of the minor defendants objecting that he had been improperly dispossessed of part of the land which had been delivered to the plaintiff. The application was made after the expiry of thirty days from the date of dispossession, and on this ground the District Munsif dismissed the application as being barred by limitation, and his order was upheld on the same grounds by the District Judge.

The petitioner preferred this appeal.

*Seshagiri Ayyar*, for appellant.

*Pattabhirama Ayyar*, for respondent.

JUDGMENT.

The respondent obtained against the appellant and others a decree for the division of some lands held in common by the parties to the suit and for the delivery of the respondent's share thereof. In execution of the decree some lands were delivered to the respondent. The appellant presented an application objecting to the delivery of certain of the parcels and complaining that he was dispossessed of them improperly. Both the Lower Courts dismissed the application on the ground that it was barred by limitation. There can be no doubt as held by the Lower Appellate Court that Article 165, Schedule II, Indian Limitation Act, is applicable to a case where the applicant is a party bound by the decree as well as where he is a stranger (see *Vythilinga Mupanar* v. *Sithalakshmi Ammal* (1)), and that article therefore is the one by which the present case is governed. But though the application here waspresented after the expiry of thirty days from the date of dispossession prescribed by that article, yet it is clear that the application was in time, inasmuch as the applicant **[496]** was, when the right to apply accrued to him as well as on the date of the application, a minor; for unquestionably the case falls within Section 7 of the Limitation Act (XV of 1877). The respondent's pleader laid much strees on the Full Bench decision in *Rama* v. *Venkatesa* (2). There it was held that property or right in Section 19 of the Limitation Act did not include such a right as that which entitles a party to a suit or proceeding to make certain applications in the course of such suit or proceeding. It is, however, difficult to see how this decision affects the present case. Now Section 7, by its very terms, applies to all applications for which a period of limitation is prescribed in the second schedule to the Act, and the application in question is of course one for which the schedule does prescribe a period. It is scarcely necessary to say that the appellant's application is not, as was assumed by the respondent's pleader in the argument, an application for execution of a decree, but one which relates to a question arising in execution between parties to the suit. Moreover, even if it were possible to treat the application in question as one for execution of a decree, it could not be held that Section 7 would be inapplicable to such an application ; for *Anantharama Ayyan* v. *Karuppanan Kalingirayen* (3) is a direct authority for the proposition that applications for execution of decrees come within Section 7. The Lower Courts were therefore in error in holding that the appellant's application was time-barred. We set aside the orders of the Lower Courts and direct that the application be restored to the file and be disposed of according to law.

The costs in this Court and in the Lower Appellate Court will abide and follow the result.

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(1) Appeal against Appellate Order No. 25 of 1889 (unreported).
(2) 5 M. 171.
(3) 4 M. 119.

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## [497] APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*

SUBBARAYAR AND OTHERS (*Plaintiffs*), *Appellants v.*
SUBBAMMAL AND OTHERS (*Defendants*), *Respondents.**
[16th, 17th and 18 March, 1898.]

*Hindu law—Adoption, giving and taking—Datta homam.*

A Brahman took a boy in adoption, but died before the ceremony of datta homam was performed. This ceremony was performed after the death of the adoptive father by his widow:

*Held*, that the adoption was valid.

APPEAL against the decree of G. T. Mackenzie, District Judge of Coimbatore, in original suit No. 28 of 1896.

The plaintiffs were the sons of the fourth defendant, who was the son of the paternal uncle of one Kuppayyar deceased. Subbammal, the first defendant, was the widow of the deceased; the second defendant was his alleged adoptive son and the third defendant was his mother. The plaint alleged that Kuppayyar died on the 27th February 1896 intestate without issue. It also contained the following averments :—

"That just a few hours before Kuppayyar's death, the first defend-"ant, her father Venkatadasappayya, the third defendant Venkalakshmi, "sister of Venkatadasappayya and mother of the deceased and other "relations of Venkatadasappayya brought into existence fraudulently a "document purporting to be a will wherein the second defendant, his "son, is alleged to have been adopted by the deceased and whereby the "bulk of properties of the latter are purported to be given away to him.

"That the allegation in the said document that the second defendant "Venkataramayyar, brother of the first defendant, was taken in adoption "by the deceased three years previously is altogether false and fraudulent "and that the alleged adoption, even if supposed to have taken place, is "not valid, the legal requirements not being complied with. And the "gift of the properties to the second defendant, as being the adopted son "of the donor, is invalid in law."

[498] The plaintiffs prayed for a declaration that the will set up, bearing date the 26th of February 1896, was not executed by the deceased, and that the gift thereunder to defendant No. 2 was of no effect, and that the alleged adoption never, in fact, took place, and that if it did was invalid in law. The written statement put in by the first defendant on her own account and, as guardian *ad litem* of defendant No. 2, contained, *inter alia*, the following averments :—

"As the late Kuppayyar was issueless, he asked his father-in-law "Venkatadasappayya to give away his third son Venkataramayyar to him, "to be brought up by him, and to be formally adopted subsequently when "his upanayanam was to be performed. The said Venkatadasappayya "accordingly gave away the boy to the deceased more than three and a "half years ago; and the boy was nurtured, brought up, and educated "with the family of the deceased, and treated by him as son and with "extreme affection.

* Appeal No. 131 of 1897.

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"Apprehensive of death, the deceased made a will on the 26th "February 1896, when he was fully conscious and while he was in a fit "state of mind and in full possession of mental powers, whereby he made "a gift of all his properties to Venkataramayyar, the second defendant, "whom he designated as his brother-in-law, and whom he treated as adopt-"ed son, and who was the object of his bounty, and providing also that "his widow should perform upanayanam, &c., on the boy. The will so "made is perfectly valid in law, and the minor, second defendant, is "validly entitled to take the properties bequeathed to him under the will "aforesaid as the *persona designata*.

"Early on the morning of the 27th February 1896, the testator "despairing of recovery, formally requested Venkatadasappayya to hand "over the second defendant to him in adoption, and the gift of the boy "was duly made to and accepted by the deceased and the first defendant. "The deceased further directed the first defendant, his widow, to have "datta homam performed, when the boy's upanayanam was to take place. "First defendant has ever been perfectly willing and ready to carry out "the direction of her deceased husband and would have completed it ere "long, but for malicious and fraudulent obstruction caused by plaintiffs "and the fourth defendant as will hereafter be mentioned.

"Defendant begs to submit that the adoption made on the 27th "February, in the manner stated, is valid in law, and is enough to [499] "confer the status of adopted son on the second defendant. Plaintiffs "have no manner of right to question the disposition under the will or "the status of the minor, second defendant.

"Defendant, therefore, begs to submit that the minor was intended "by the testator to take, and he is entitled to take, under the will as "*persona designata*, independently of adoption by reason of his having "been treated and brought up as son by the testator; that the adoption "of the second defendant formally made with legal accompaniments of "gift and acceptance on the morning of the 27th February is valid in law "without more; that the formal adoption so made with a direction to "the first defendant to perform the datta homam at the time of upanaya-"nam is valid in law; that in any event, the plaintiffs have no cause of "action to sue and are not entitled to impugn the will assented to and "acquiesced in by their father, fourth defendant, under whom alone they "claim in law."

The first issue raised the question whether the plaintiffs were entitled to sue. The second related to the fact of the will and the third, fourth and fifth issues were as follows:—

"(3) Whether the document, if properly executed, confers any, and "if so, what interest on second defendant?

"(4) Whether there was a gift and acceptance of second defendant "on 27th February 1896 as alleged in paragraph 50 of the written state-"ment, and whether such an act alone would constitute a valid adoption?

"(5) Whether first defendant was directed by the late Kuppayyar to "perform datta homam by the upanayanam of second defendant and "whether such a direction has any legal effect?"

As to the first issue the District Judge said that he was disposed to hold that the interest of the plaintiffs was too remote to enable them to maintain the suit. As to the second issue he held that the will was duly executed by the testator without any undue influence or fraud being used. As to the third issue he held that the second defendant had title under

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the will whether or not the adoption was valid. On the fourth issue his finding was "that there was a giving and taking on 26th February 1896, "and that this ceremony was not invalid."

Upon the fifth issue his finding was as follows:—"I find that deceased did authorize his wife to perform datta homam and that such authorization is valid. I regard the will as an authority to [500] adopt and that would necessarily include authority to supply the necessary ceremonies in an inchoate adoption. Also I find that when second defendant was given and taken on the 27th, there was verbal authority to the wife to complete the ceremony by the necessary datta homam "(*Santappayya* v. *Rangappayya* (1)).

In the result the District Judge dismissed the suit.

The plaintiffs preferred this appeal.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*), *Pattabhirama Ayyar*, *K. Narayana Rau* and *Tiruvenkatachariar*, for appellants.

Mr. *E. Norton*, *Sadagopachariar* and *Kasturiranga Ayyangar*, for respondents.

JUDGMENT.

The principal questions raised in this case are, first, whether the will (Exhibit I) was executed by the deceased Kuppayyar when he was of sound mind; secondly, whether the second defendant was the validly adopted son of Kuppayyar; and thirdly, if the second defendant was not validly adopted, whether he is nevertheless entitled to take the property under the will as the *persona designata*.

The District Judge has found the first question in favour of the defence, and we have no doubt that that the finding is correct. That the will was executed by Kuppayyar is really beyond dispute. It is sufficient on this point to refer to the Sub-Registrar's evidence, before whom the testator Kuppayyar admitted the execution, and the fact that the fourth defendant, the nearest reversioner and father of the plaintiffs himself has attested the execution by Kuppayyar. As to the state of mind of the testator at the time of his execution of the will, it is quite true that he was then "*in extremis*," so that it lies on the party propounding the will to make out by clear and satisfactory evidence that the testator was in a fit and proper state of mind to understand and appreciate what he was doing. This has, in our opinion, been most satisfactorily established by the evidence called on behalf of the defence. There is first the evidence of the writer of the will (whom there is no ground whatever for discrediting) which shows that it was on the testator's own instructions that he drafted the will, and that those instructions were given spontaneously. Then there is the evidence of the two village officers—maniem and karnam—equally satisfactory witnesses, [501] which proves that the testator was fully aware of what he was doing when he signed the will, and their present evidence is corroborated by the statements made by them contemporaneously before the Sub-Registrar. The evidence of this latter officer is to our mind conclusive on the point. He questioned the testator regarding the will and satisfied himself by his own observation as well as by the evidence of the village officers whom he examined in accordance with a rule of the registration department, that the testator was in the full possession of his senses. We consider the attempt made to impute corrupt conduct to the Sub-Registrar was entirely without foundation and altogether unjustifiable. Exhibit F that was

(1) 18 M. 397.

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put forward to suggest that he had received an illegal gratification in the matter of the registration is a patent concoction. It bears a date corresponding with the 27th February, the day on which the document was presented, and accepted for registration, and the statement therein made that the Sub-Registrar had then been postponing return of the document from day to day is intrinsic evidence of its fabricated character. All the above direct evidence in favour of the testator's state of mind is confirmed by the fact that the testator signed his name a number of times in the schedule to Exhibit I in the presence of the Sub-Registrar; and those signatures are all natural and in their appropriate places indicating that the testator was in the possession of his faculties. It is scarcely necessary to add that the fourth defendant would not have attested the document, which cut off the reversionary right of himself and his sons, unless he was fully convinced that the testator was in his proper senses. The evidence of the plaintiff's seventh, eight and fifteenth witnesses to which our attention was specially drawn does not meet the evidence for the defence to which we have referred. It is vague and inconclusive even if true, but in our opinion it is entirely untrustworthy. Turning to the provisions of the will they are simple and required no great effort of the mind to grasp—in effect the terms amount to nothing more than that the second defendant should take the whole property, protect the two remaining members of the family and maintain the charities. We have, therefore, no hesitation in deciding the first point against the plaintiffs.

Passing next to the question of adoption, we are unable to agree with the District Judge that the giving and taking said to have taken place on the morning of the 27th February 1896 before [502] the testator's death is true. If there had been such a giving and taking, reference must have been made to the fact in the subsequent documents (Exhibits D, C and B) where the question of the adoption was the prominent one. On the other hand, the adoption referred to in those documents was one made three years before Kuppayyar's death. We must, therefore, reject the case of a gift and acceptance on the 27th of February 1896. Nevertheless, we are satisfied that the second defendant was validly adopted. It appears from the will itself that the second defendant had been treated as the adopted son for three years during which time he had resided not with his natural family, but with the deceased, and Exhibit D shows what was done at the time the second defendant left his natural father. It contains a statement of the widow and the mother of deceased, certified to by the natural father and by half a dozen independent persons that there was a "vacchadatta," that is, a gift and acceptance of second defendant, but unaccompanied with the performance of datta homam which was to be performed at his upanayanam or thread ceremony. The statement was taken in reference to a complaint made by the fourth defendant to the head of the mutt, to which the parties were subject, and was made in the presence of the fourth defendant who, so far as the evidence goes, has never contradicted it until he was examined as a witness in this case. That statement too receives corroboration from the recitals in the will, the probabilities and other evidence in the case. And as the datta homam involving, of course, a formal gift and acceptance has since been performed, the adoption of the second defendant is now complete and valid. It is true that the will makes no reference in terms to the performance of datta homam by the widow. But in the circumstances of the case the direction in the will that she should cause the second defendant's upanayanam to be performed most clearly implied that the datta homam should

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precede the upanayanam, so that the latter ceremony was that of an adopted son, the testator having regarded the second defendant as such son. The case is within the principle of *Venkata* v. *Subhadra* (1). There it was the giver in adoption who had died before the datta homam and here it is the acceptor who had died; and this difference does not affect the principle. Though no express issue was framed as to the factum of gift and acceptance three years before [503] testator's death, the question was distinctly raised in the pleadings and was present to the minds of the parties at the trial and evidence was adduced thereon. Having arrived at this conclusion in favour of the adoption, it is unnecessary to express any opinion on the question of *persona designata* assuming that there was no adoption. The decree of the Lower Court is confirmed and this appeal dismissed with costs.

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**21 M. 503=8 M.L.J. 207.**

## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.*

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FOULKES (*Defendant*), *Appellant v.* MUTHUSAMI GOUNDAN (*Plaintiff*), *Respondent.** [19th and 23rd August, 1898.]

*Rent Recovery Act (Madras)—Act VIII of* 1865, *Section* 11—*Reduction of assessment in patta of* 1840—*Construction of patta prescribing rent to be paid permanently by tenant.*

In 1840 a mittadar granted to a tenant a patta for certain land in which the tenant had already a heritable estate, fixing the rent at the reduced rate Rs. 40. The document provided "this sum of Rs. 40 you are to pay perpetually every "year per kistbandi, in the mitta catcheri." It appeared that the rent fixed was less than what was payable upon the lands previous to the date of the patta and also less than that payable upon neighbouring lands of similar quality and description:

*Held* (1) that the facts of the case were distinguishable from those of *Rajaram* v. *Narasinga* (15 M. 199), and that the patta fixing the rent was binding upon the representatives in title of the grantor and the grantee, respectively;

(2) that the reduction in the rate of rent was not invalidated by Rent Recovery Act, 1865, Section 11.

[R., 4 Ind. Cas. 1136 (1138)=5 M.L.T. 264 (267).]

SECOND appeal against the decree of K. Ramachandra Ayyar, Acting Subordinate Judge of Salem, in appeal suit No. 91 of 1895, reversing the decree of J. Solomon Gnaniyar Nadar, Acting District Munsif of Salem, in original suit No. 790 of 1893.

The plaintiff who was a tenant in the defendant's mitta sued for a declaration that the patta tendered to him for Fasli 1302 was improper and that the patta fixing rent permanently, issued to his predecessor in title in 1840 by the predecessor in title of [504] defendant, was binding on the defendant. The District Munsif held that the patta of 1840 did not enure beyond the lifetime of the grantee and consequently that the plaintiff had no rights under it and he dismissed the suit. The document in question was filed as Exhibit A and it was, omitting parcels, in the following terms:—

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* Second Appeal No. 1060 of 1897.

(1) 7 M. 548.

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"Patta of Narahari Ayyar of Velagapudi Ponnammapet. Pattayam "of the assessment or rent of the lands given to Narahari Ayyar of "Velagapudi, a raiyat of Mouzah Ammapet village, attached to the Salem "mitta, by George Frederick Fischer, Esquire, Zemindar of Salem mitta, "as follows :—'The lands cultivated by you in the above village are : . . "'. . Total sum for the nanja and punja together is Rs. 108-14-3; "'balance after deducting Rs. 5-13-10 for *sugavasi*, the remainder is "'Rs. 103-0-5; cowle therefor is Rs. 40; you should pay every year this "'sum of forty rupees for cowle tenure, permanently according to the kist-"'bandi, in the mitta office and should get the receipt.'"

The Subordinate Judge was of opinion that this instrument was binding on the defendant and consequently that the patta tendered to the plaintiff for Fasli 1302 was an improper patta, and he made a declaration accordingly. The Subordinate Judge said :—

"In *Rajaram* v. *Narasinga* (1), *Tulshi Pershad Singh* v. *Ramnarain* "*Singh* (2), and *Bilasmoni Dasi* v. *Raja Sheopersad Singh* (3), the docu-"ments which the Courts had to construe were in the nature of leases "creating a new tenancy; and it was held that the words used did not "*per se* convey a hereditary estate. In the present case the estate is "hereditary—*i.e.*, occupancy right is the tenant's, the zemindar being "entitled only to rent.

"Whether the reduction of the rent to less than the faisal rates by "one zemindar would bind the succeeding zemindar, is the real point for "consideration. In solving this question we are to be guided by Section "11 of Act VIII of 1865 (Madras). The plaintiff's father who granted "Exhibit A reduced the faisal rents for a proper and legal consideration, "to wit—valuable services rendered to the zemindari by the grantee's "father Sambayyan (senior). Defendant distinctly admits the circum-"stance. Further, defendant's father died in about 1867, and defendant "has been [505] continuing to respect the terms of Exhibit A. In 1884 "her attempt to ignore the same by trying to enforce a patta with the "faisal rates was disallowed by the dismissal of her suit. From her con-"duct, therefore, the Court has to hold she has become debarred from "calling into question rates of rent which have been prevailing for over "fifty years irrespective of who is the tenant, who is in enjoyment—"whether the grantee's family or the alienee of the family. Whether "plaintiff's successor will or will not be bound to respect the cowle, it is "not now necessary to determine. All contracts of rent have to be en-"forced except in the excepted circumstances specified in the Rent Law."

The defendant preferred this second appeal.

*Pattabhirama Ayyar*, for appellant.

*R. Subramania Ayyar*, for respondent.

## JUDGMENT.

SUBRAMANIA AYYAR, J.—The first question for determination is whether under Exhibit A, the patta, dated the 16th November 1841, granted by the appellant's father, the late Mr. George Frederick Fischer, the then owner of the Salem Mitta, to the late Narahari Ayyar, a raiyat that held certain lands in the mitta, which are now in the possession of the respondent claiming through Narahari Ayyar's son Ramakrishnayyan, the annual assessment in respect of those lands, fixed at Rs. 40, instead

(1) 15 M. 199. (2) 12 C. 117. (3) 8 C. 664.

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of Rs. 103-0-5 payable till that time, was fixed in perpetuity. After setting forth certain details immaterial for our present purpose, the patta concludes thus—"The remainder is Rs. 103-0-5. Cowle therefor is Rs. 40; "this sum of forty rupees you shall pay perpetually (saswathamayi is the "vernacular word) every year as per kist in the mitta catcheri and obtain "receipt." The learned vakil for the appellant, in support of his argument that the patta should not be construed as fixing the assessment at Rs. 40 for ever, relied on *Rajaram* v. *Narasinga* (1) where the meaning of the word 'saswatham,' the adverbial form of which occurs in Exhibit A, had to be considered and where Parker and Shephard, JJ., held that no hereditary estate was granted under the instrument then in question, though it contained as qualifying the term izara the words 'kayam saswatham'—words which, in the opinion of the learned Judges, were not distinguishable from the similar expression in vogue in the North of India, *viz.*, 'istemarari mukarari' which **[506]** was treated by the Judicial Committee in *Tulshi Pershad Singh* v. *Ramnarain Singh* (2), as not conveying *per se* a hereditary estate. I do not, however, think that Parker and Shephard, JJ., intended to lay down a rule, as to the meaning of the word 'saswatham' and its derivatives, to be applied in all cases. The decision must be taken with reference to the facts there. And the conduct of the parties, noticed in the concluding part of the judgment of Parker, J., would seem to have rendered almost inevitable the conclusion that the estate in that case was not hereditary. It is also necessary to point out that in considering the applicability of the above Privy Council decision to cases like the present, we ought not to overlook the important fact that the phrase 'istemarari mukarari,' though lexicographically importing perpetuity, has, as stated by their Lordships themselves in the case referred to, acquired a restricted customary meaning in that part of the country (*Tulshi Pershad Singh* v. *Ramnarain Singh* (2)), whereas the word 'saswathamayi,' with which we are now concerned, has acquired no such secondary signification here. It is quite true, as urged for the appellant, that when land or even an interest in land is intended to be transferred hereditarily, it is usual to indicate that intention by the use of the words 'from son to grandson,' 'from generation to generation,' or the like. In the present instance, however, there was no transfer of land, or an interest in land, but only an agreement as to the rate at which assessment was to be paid in respect of lands, in which the party bound to pay the assessment admittedly already possessed a heritable estate. In such an agreement words, usually employed in grants intended to convey an estate of inheritance, would not be used, but the more appropriate term 'saswathamayi' found in Exhibit A, or 'என்றென்றைக்கும்' (enranraikkum) or other similar phrase would be employed to show that the arrangement was intended to be perpetual. And as there is nothing in the language of the rest of the document to warrant a different construction, we must give to the word in question its natural and ordinary meaning and hold that the patta fixes the assessment at Rs. 40 permanently and for ever, and that the respondent's right under Exhibit A to object to the appellant claiming more than Rs. 40 is not affected in any way by Exhibit I, inasmuch as the latter document is not shown to have been executed under circumstances **[507]** which make it binding upon Ramakrishnayyan, who was then a minor.

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(1) 15 M. 199.
(2) 12 C. 117.

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It was next urged on behalf of the appellant that as the rate so fixed was less than what was payable upon the lands till the date of the patta, and also less than that payable upon neighbouring lands of similar quality and description, and as such reduction in the assessment was not granted for any of the special purposes mentioned in the second proviso to Section 11 of the Rent Recovery Act, VIII of 1865, the patta should, as against the appellant as the late Mr. Fischer's successor and the present proprietor of the mitta, be held to be invalid under that proviso. But this contention is obviously unsustainable for the simple reason that the patta had been executed long before the proviso relied on was enacted. It is scarcely necessary to observe that a statute ought not to be construed retrospectively, "unless," in the words of Erle, C.J., quoted with approval very recently by the Judicial Committee in *Young* v. *Adams* (1), "the intention of the legislature that it should be "so construed is expressed in plain and unambiguous language, because "it manifestly shocks one's sense of justice that an act legal at the time "of doing it should be made unlawful by some new enactment." And it is hardly necessary to add that there is absolutely nothing in the Rent Recovery Act to show that retrospective operation was intended to be given to the proviso in question. I would, therefore, dismiss the second appeal with costs.

MOORE, J.—I concur.

(1) [1898] A. C. 469 (476).

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(2) *Ss.* 3, 4, 7, 11, 14—*Suspension and dismissal of trustee of a temple—Powers of temple committee—Civ. Pro. Code—Act* XIV *of* 1832, *s.* 575—*Appeal referred owing to a difference of opinion on a point of law.*—The plaintiff was appointed to the office of trustee of a Hindu temple under Religious Endowments Act, 1863, s. 3, by the temple committee constituted under that Act. Subsequently the committee, having received certain complaints against him, suspended him from office pending inquiry without calling on him for an explanation. They alleged as the grounds of his suspension that he had caused loss of property and money to the temple and that he had conducted things in the temple contrary to custom so as to cause a disturbance of the peace. The trustee refused to acquiesce in the order of suspension and to give up certain records, &c., which he was by that order required to deliver, and denied the authority of the committee as asserted by them. Shortly afterwards the committee dismissed him. The plaintiff denying that his suspension and dismissal were legal, brought two suits against the members of the committee, the first for damages for the suspension, and the second for an injunction to restrain the defendants from interfering with his discharge of his duties as trustee. Both of these suits were dismissed and the plaintiff preferred appeals to the High Court. In the appeal relating to the claim for an injunction, it was found that no misconduct had been proved against the plaintiff previous to the order of suspension:—*Held*, by SHEPHARD and DAVIES, JJ., that a trustee in the position of the plaintiff connot be dismissed from office except for good cause shown, and that his conduct

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subsequent to the order of suspension did not amount to such good cause. In the appeal relating to damages :—*Held*, by SHEPHARD, J., that the order of suspension was illegal and that under the circumstances the plaintiff was entitled to substantial damages :—*Held*, by DAVIES, J. (finding that the committee had proceeded in the *bona fide* belief that they were acting for the good of the temple in suspending the plaintiff pending inquiry), that the order of suspension was not illegal and that the suit was rightly dismissed. Owing to the difference of opinion between the two Judges the last-mentioned appeal was referred to the Chief Justice under Civ. Pro. Code, s. 575, and was heard by him sitting with the two other Judges :—*Held* that the whole appeal was open for argument and not only the point of law on which the Judges had differed in opinion :—*Held*, by COLLINS, C.J., and SHEPHARD, J. (DAVIES, J., *diss.*), that the order of suspension was illegal and the plaintiff was entitled to substantial damages. *Per* COLLINS, C.J.—The power of suspension by the committee is, in my judgment, the same as the power of dismissal. The committee, having made due inquiry and having called on the trustee for an explanation, may suspend for good and sufficient cause, but not otherwise. SESHADRI AYYANGAR *v.* NATARAJA AYYAR, 21 M. 179 ... 483

(3) S. 18—Civ. Pro. Code—Act XIV of 1882, ss. 2, 588—Order for payment of plaintiffs' costs out of the funds of the institution—Appeal on behalf of the institution. See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 421.

**Act XXIII of 1871 (Pensions).**

(1) *S. 4—Suit relating to inam land granted before the time of the British Government—Confirmation of inam—Construction and enforceability of compromise of suit between members of grantee's family—Removal of manager—Appointment of receiver.*—Early in the eighteenth century two villages were granted by the Zemindars of Sivaganga and Guntamanaikanur to the last of the Naik rulers of Madura for the maintenance of the rank and dignity of his family which was now represented by the plaintiffs and defendants Nos. 1 to 23. The property was long managed by the representative, for the time being, of the senior line. In 1844 one of the junior members instituted a suit for partition, which terminated in a decree declaring the corpus of the property to be indivisible and the annual produce to be divisible in certain shares. Subsequently in 1857 a compromise was entered into, by which the parties agreed to vary the distribution of the shares, but they agreed that the management of the estate, indivisible and inalienable, should continue to be vested in the eldest line subject to certain supervision on the part of the other members. The compromise was long acted upon by the family; but in 1892 the representative of the senior line died, leaving only his widow and infant sons. The widow, as guardian of the elder son, then entered on the management, and, being gosha, delegated it to a stranger. The plaintiffs representing a junior line now sued for the removal of these persons from management and the appointment of another manager, alleging both that they had no right to the managership and also that they had been guilty of mismanagement. All the members of the family were made parties to the suit. It appeared that the plaintiffs had not received their proper share of the produce and the defendants in management denied in the pleadings their right thereto. The plaintiffs had not obtained a certificate from the Collector under the Pensions Act XXIII of 1871, and it appeared that the grant of the villages had been confirmed as an inam by the British

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Government :—*Held*, (1) that the suit did not fall within the provisions of Pensions Act, s. 4, and a certificate of the Collector was accordingly unnecessary; (2) that the compromise was binding on the parties, and that under the compromise the plaintiffs had no right to joint management; and (3) that the widow of the last manager should be removed from the managership, and that until one of her sons came of age the estate should be managed by a receiver appointed from among the members of the family. KUMARA TIRUMALAI NAIK v. BANGARU TIRUMALAI SAURI NAIK, 21 M. 310 ... 575

(2) S. 12—Political pension of Zamorin of Calicut—"Payable"—Power of disposition by will. See MALABAR LAW (WILL), 21 M. 105.

**Act XV of 1872 (Christian Marriage).**

*S.* 68—*Solemnize.*—In Indian Christian Marriage Act, s. 68. the word 'solemnize' is equivalent to the words 'conduct, celebrate or perform.' Therefore any unathorised person not being one of the persons being married, who takes part in performing a marriage, that is, in doing any act supposed to be material to constitute the marriage is liable to be convicted under that section; and a charge of abetment is sustainable against the persons being married. QUEEN-EMPRESS v. PAUL, 20 M. 12 = 1 Weir 820 ... 9

**Act V of 1876 (Reformatory Schools).**

S. 22—See ACT VIII OF 1897 (REFOMATORY SCHOOLS), 21 M. 430.

**Act XI of 1878 (Arms).**

*S.* 4—*Possession of unserviceable fire-arm without a license.*—A revolver with a broken trigger is within the definition of "arms" in Indian Arms Act, 1878, s. 4. Whether in any particular case an instrument is a fire-arm or not, is a question of fact to be determined according to circumstance, and the circumstance that it is in an unserviceable condition is not conclusive. QUEEN-EMPRESS v. JAYARAMI REDDI, 21 M. 360 (F.B.) = 1 Weir 659 ... 611

**Act XVIII of 1879 (Legal Practitioners).**

*S.* 28—*Oral agreement for pleader's remuneration—Criminal proceedings—*'Quantum meruit.'—A pleader was retained by an accused person to conduct his defence. The accused did not pay the agreed fee, and the plaintiff whereupon declined to conduct his defence. The defendant, who was one of the accused, then undertook orally to pay the fee, but failed to do so after the plaintiff had conducted the defence of both accused persons. The plaintiff now sued the defendant to recover the agreed amount :—*Held*, that under Legal Practitioners Act, s. 28, the plaintiff was not entitled to recover on the contract, but that he was entitled to recover reasonable remuneration for the services rendered by him. NARASIMMA CHARIAR v. SINNAVAN, 20 M. 365 ... 259

**Act II of 1882 (Trusts).**

Ss. 91, 95—Specific Relief Act—Act I of 1877, s. 56, cl. (*b*)—Civ. Pro. Code—Act XIV of 1882, s. 232—Decree obtained on a benami mortgage by benamidar—Suit by real mortgagee—Declaration—Injunction—See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 353.

**Act XV of 1882 (Presidency Small Cause Courts).**

(1) *S.* 37—*Amendment Act—Act* I *of* 1895, *s.* 13—*Powers of Full Bench—Appeal.*—Act I of 1895, s. 13, does not empower the Full Bench of the

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Presidency Court of Small Causes to entertain appeals on questions of fact against the decree of one of the Judges of the Court. SRINIVASA CHARLU v. BALAJI RAU, 21 M. 232 ... 519

(2) *Ss.* 37, 38, 69—*Stating case on application for a new trial.*—When, upon an application to the Presidency Small Cause Court for a new trial, the Judges differ in their opinion as to any question of law and the majority without ordering a new trial reverse the decree of the Judge who tried the suit, the Court is bound to state a case for the opinion of the High Court under s. 69 of the Presidency Small Cause Courts Act. SESHAMMAL v. MUNUSAMI MUDALI, 20 M. 358=7 M.L.J. 140 ... 254

**Act VII of 1887 (Suits Valuation).**

(1) S. 8—Civ Pro. Code—Act XIV of 1882, s. 2—Suit for partition—Order by Appellate Court directing that the plaint be returned—Appeal against such order—Amendment of memorandum of appeal—See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 234.

(2) *S.* 8—*Suit for partition of family property—Valuation of, for purposes of jurisdiction—Court Fees Act,* 1870, *s.* 7, *cl.* (*iv*) (*b*).—In a suit by a member of a joint Hindu family praying for a partition of the family property and for the delivery to the plaintiff of his share, the value of the suit for the purposes of jurisdiction is the amount at which the plaintiff values his share. VELU GOUNDAN v. KUMARAVELU GOUNDAN, 20 M. 289=7 M.L.J. 30 ... 206

**Act IX of 1887 (Provincial Small Cause Courts).**

(1) *Sch.* I, *art.* 38—*Suit for arrears of maintenance.*—A suit for arrears of maintenance payable under a written agreement does not lie in a Provincial Small Cause Court. SAMINATHA AYYAN v. MANGALATHAMMAL, 20 M. 29 ... 21

(2) *Sch.* II, *arts.* 11, 13—*Suit for jodi.*—A suit for arrears of jodi is maintainable as a Small Cause suit under Provincial Small Cause Courts' Act, 1887. VENKATAGIRI RAJAH v. VENKAT RAU, 21 M. 243 ... 528

(3) *Sch.* II, *arts.* 11 *and* 14—*Civ. Pro. Code, s.* 470—*Inter-pleader suit—Claim for compensation awarded under Land Acquisition Act.*—Land having been compulsorily acquired under Land Acquisition Act for the purpose of the East Coast Railway, the compensation was fixed at Rs. 468. A conflict having arisen as to the right to receive the compensation, and District Court having declined to determine it under Land Acquisition Act, s. 15, an inter-pleader suit was instituted on behalf of the Secretary of State in the Court of the District Munsif. The decision of the District Munsif having been confirmed on appeal, the unsuccessful claimant preferred a petition to the High Court under s. 622, Civ. Pro. Code :—*Held* that the inter-pleader suit was not within the jurisdiction of a Provincial Small Cause Court and was rightly brought on the ordinary side of the District Munsif's Court and consequently where the petitioner's remedy was by way of second appeal the petition for revision was not admissible. TIRUAPATI RAJU v. VISSAM RAJU, 20 M. 155 ... 109

(4) *Sch.* II, *art.* 18—*Suit by temple manager against his predecessor for damages sustained by temple.*—A suit by the manager of a temple against his predecessor in office for damages sustained by the temple owing to the negligence of the defendant is not cognizable by a Court of Small Causes. KRISHNAYYAR v. SOUNDARARAJA AYYENGAR, 21 M. 245 ... 529

**Act IX of 1887 (Provincial Small Cause Courts)—(*Concluded*).** PAGE

(5) *Sch.* II, *Art.* 35—*Suit for compensation for illegal attachment—Suit to recover money paid in excess.*—The plaintiff sued to recover from his landlord a sum which the defendant had collected in excess of what was properly due to him by distraint of the plaintiff's cattle :—*Held*, that the suit was cognizable by the Small Cause Court. KARUPPANAN AMBALAM v. RAMASAMI CHETTI, 21 M. 239=8 M.L.J. 165 ... 525

**Act VIII of 1890 (Guardians and Wards).**

*Ss.* 7, 8—*Testamentary appointment of a guardian.*—A Hindu mother has no authority to appoint a guardian for her son by will ; it is accordingly the duty of the Court on an application under Guardians and Wards Act, 1890, for the appointment of a guardian for the son of a Hindu widow who had purported to make such an appointment to inquire, under s. 7, as to the necessity for an appointment being made and itself to appoint a fit and proper person. VENKAYYA GARU v. VENKATANARASIMHULU, 21 M. 401 8 M.L.J. 112 ... 640

**Act IX of 1890 (Railways).**

(1) *S.* 72—*Contract Act—Act* IX *of* 1872, *s.* 73—*Condition under which goods despatched by railway — Deterioration— Remoteness of damage.*—The plaintiff who was a tailor delivered a sewing machine and some cloths to the Madras Railway Company (the defendant) to be sent to a place where he expected to carry on his business with special profit by reason of a forthcoming festival. Through the fault of the Company's servants the goods were delayed in transmission and were not delivered until some days after the conclusion of the festival. The plaintiff had given no notice to the Company that the goods were required to be delivered within a fixed time for any special purpose, and he had signed a forwarding note under a statement that he agreed to be bound by the conditions at the back and one of those conditions was to the effect that the Company is not liable "for any loss of or damage to any goods whatever by reason of accidental "or unavoidable delays in transit or otherwise." The plaintiff now sued to recover from the Company a sum on account of his estimated profits and the travelling expenses of himself and his assistant at the place of destination and their expenses for food and lodging while there :—*Held*, (1) that as the plaintiff had not shown that the goods had undergone deterioration in value or otherwise the condition above cited was not void under Railways Act, 1890, s. 72, although it had not been approved by the Governor-General in Council ; (2) that the plaintiff was bound by the condition even if he was in fact ignorant of its effect ; and (3) that the damages claimed were too remote. MADRAS RAILWAY COMPANY v. GOVINDA RAU, 21 M. 172=8 M.L.J. 85 ... 478

(2) *S.* 113—*Excess charge and fare recoverable as a fine—Magistrate not competent to impose imprisonment in default—Fine—Imprisonment.*—S. 113, sub-s. (4), (1) of the Indian Railway Act (IX of 1890), which directs that, on failure to pay on demand excess charge and fare when due, the amount shall, on application, be recovered by a Magistrate as if it were a fine, does not authorise the Magistrate to impose imprisonment in default. The excess charge and fare referred to in the section is not a fine, though it may be recovered as such. QUEEN-EMPRESS v. SUBBAMANIA AYYAR, 20 M. 385=1 Weir 871 ... 273

**Act I of 1895 (Presidency Small Cause Courts Amendment).**

S. 13—See ACT XV OF 1892 (PRESIDENCY SMALL CAUSE COURTS), 21 M. 232.

**Act VIII of 1897 (Reformatory Schools).** PAGE

*S.* 8—*R formatory Schools Act—Act* V *of* 1876, s. 22—*Period of detention in reformatory—Rules under Act of* 1876,—*Held*, by SHEPHARD, Offg. C.J., affirming the judgment of MOORE, J. (DAVIES, J., *diss.*) that the rules made by Government under Act V of 1876 must be deemed to have been made under Act VIII of 1897; and that Magistrates acting under Act VIII of 1897 must order the detention of a juvenile offender until he attains the age of eighteen. QUEEN-EMPRESS v. RAMALINGAM, 21 M. 430=1 Weir 880 ... 661

## 2.—Madras Acts.

**Act II of 1864 (Revenue Recovery, Madras).**

(1) *S.* 38—*Sale for arrears of revenue*—Benami *purchase.*—The purchaser at a sale held for arrears of revenue sued for possession of the land. It was pleaded that his purchase was made *benami* for the persons from whom the defendant derived title:—*Held*, that Revenue Recovery Act, s. 38, did not debar the defendant from raising this plea, and that the averments on which it was based having been proved, the suit should be dismissed. SUBBARAYAR v. ASIRVATHA UPADESAYYAR, 20 M. 494=7 M.L.J. 201. ... 351

(2) *S.* 38—*Sale for arrears of revenue—Confirmation of sale after cancellation.*—When a Collector has passed an order under s. 38 of Madras Act II of 1864, setting aside a sale for arrears of revenue, he cannot subsequently confirm the sale. KALIAPPA GOUNDEN v. VENKATACHALLA THEVAN, 20 M. 253. ... 180

**Act VIII of 1865 (Rent Recovery Madras).**

(1) See LIMITATION, 20 M. 6.

(2) *S.* 3—*Mokhassa inamdars paying kattubadi to the zemindar—Obligation to accept patta.*—Mokhassa-inamdars, who hold lands in a zemindari and pay kattubadi annually to the zemindar and who are not cultivating tenants, are not bound to accept a patta from the zemindar. LAKSHMINARAYANA PANTULU v. VENKATARAYANAM, 21 M. 116 (F. B.)=8 M.L.J. 43 ... 439

(3) S. 7—See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 392.

(4) *S.* 8—*Suit to enforce tender of patta—Suit brought after expiration of fasli.*—A tenant is not entitled to bring a suit under Rent Recovery Act, 1865, s. 8, to enforce the tender of a patta by his landlord after the expiration of the fasli to which the patta relates. RAMASAMI MUDALIAR v. RATHNA MUDALIAR, 21 M. 148 ... 461

(5) *S.* 10—*Order of ejectment—Suit to set aside such order.*—*Held* (DAVIES, J., *diss.*), that a tenant who has been ejected in pursuance of an order under Rent Recovery Act (Madras), s. 10, cannot maintain a suit to question the legality of that order. MANICKA GRAMANI v. RAMACHANDRA AYYAR, 21 M. 482=8 M.L.J. 210 ... 697

(6) *S.* 11—*Enhancement of rent—Custom.*—The imposition by a zemindar of garden assessment on land brought under garden cultivation by a tenant who improved the land by sinking a well after 1865 is illegal, although there might be a custom in the zemindari of charging a varying assessment according to the kind of crop raised. FISCHER v. KAMAKSHI PILLAI, 21 M. 136 ... 452

(7) *S.* 11—*Reduction of assessment in patta of* 1840—*Construction of patta prescribing rent to be paid permanently by tenant.*—In 1840 a mittadar granted

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to a tenant a patta for certain land in which the tenant had already a heritable estate, fixing the rent at the reduced rate, Rs. 40. The document provided "this sum of Rs. 40 you are to pay perpetually every year per "kistbandi in the mitta catcheri." It appeared that the rent fixed was less than what was payable upon the lands previous to the date of the patta and also less than that payable upon neighbouring lands of similar quality and description :—*Held*, (1) that the facts of the case were distinguishable from those of 15 M. 199, and that the patta fixing the rent was binding upon the representatives in title of the grantor and the grantee, respectively; and (2) that the reduction in the rate of rent was not invalidated by Rent Recovery Act, 1865, s. 11. FOULKES v. MUTHUSAMI GOUNDAN, 21 M. 503 8 M L.J. 207 ... 712

(8) *S. 14—Suit for rent—Limitation.*—When a tenant has executed a muchalka specifying the dates on which the various instalments of rent are payable, the period of limitation for a suit by the landlord for the rent is to be computed from such dates. VENKATAGIRI RAJAH v. RAMASAMI, 21 M. 413 ... 649

(9) S. 18—Civ. Pro. Code—Act XIV of 1882, s. 43—Suit by a landlord in the Court of the District Munsif for arrears of rent for two years—Subsequent attachment for rent of a third year accrued due at date of suit—See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 236.

(10) *Ss. 18, 39 and 40—Attachment for arrears of rent—Suit to set aside attachment—Subsequent sale.*—A landlord attached his tenant's holding for arrears of rent in 1889, and within the time prescribed by Rent Recovery Act, s. 18, put in an application for sale to the Collector, and otherwise complied with the procedure prescribed by the Act. The land was sold, but the sale was set aside as having been irregularly conducted. The landlord then made in 1894 an application to the Collector for a fresh sale which was granted; a fresh sale took place without a fresh notice being given to the tenant under s. 39 of the intention to sell. The tenant now sued to have this sale set aside :—*Held*, that the plaintiff was not entitled to have the sale set aside. OLIVER v. ANANTHARAMAYYAR, 20 M. 498. 353

(11) Ss. 18, 69—Deduction of time occupied in obtaining copy of judgment appealed against—Limitation Act, ss. 6, 12—See LIMITATION ACT (XV OF 1877), 20 M. 476.

(12) Ss. 38, 39, 40—See LIMITATION ACT (XV OF 1877), 20 M. 33.

(13) *S. 78—Limitation—Suit to recover property wrongfully distrained.*—The plaintiff sued to recover certain property wrongfully distrained by the defendant who was his landlord, or in the alternative for its value. The defendant had tendered no patta to the plaintiff, but the distraint had taken place professedly under the Rent Recovery Act. The suit was not brought within six months from the date of the wrongful distraint :—*Held*, that the suit was not barred under Rent Recovery Act, s. 78. RAJA GOUNDAN v. RANGAYA GOUNDAN, 20 M. 449=7 M.L.J. 225 ... 318

**Act V of 1882 (Forest, Madras).**

*Ss. 10, 11—Claim to uninterrupted flow of natural stream—Jurisdiction of Forest Settlement-officer.*—A Forest Settlement-officer appointed under s. 4 of the Madras Forest Act, 1882, has, under ss. 10 and 11 of that Act, jurisdiction to decide a claim by a riparian owner to the uninterrupted flow of the water of a natural stream. SANGILI VEERA PANDIA CHINNA TAMBIAR v. SUNDARAM AYYAR, 20 M. 279 ... 199

**Act IV of 1884 (District Municipalities, Madras).** PAGE

(1) *Profession tax—English Insurance Company carrying on business by agents in India.*—The plaintiff was an English Insurance Company which carried on business at Cocanada by its agents, merchants of that place, at the business premises of the agents. The Municipal Council of Cocanada having levied profession tax on the plaintiff, this suit was brought in 1896 to recover the amount :—*Held*, that the tax had been illegally levied, and that the plaintiffs were entitled to a decree for its refund. MUNICIPAL COUNCIL, COCANADA v. ROYAL INSURANCE COMPANY, LIVERPOOL, 21 M. 5 ... 360

(2) *S.* 11—*Interference with a public drain.*—The owner of a house in a street at Tanjore renewed, without the sanction of the Municipal Council, the masonry covering of a drain in front of his house :—*Held*, that the act of the plaintiff did not constitute an interference with the drain within the meaning of District Municipalities Act, s. 211. MUNICIPAL COUNCIL, TANJORE v. VISVANATHA RAU, 21 M. 48=7 M.L.J. 273 ... 359

(3) *Ss.* 63, 262—*House tax assessed on school buildings—Suit to recover tax payable under protest.*—House-tax and water-tax was levied under District Municipalities Act (Madras), 1884, s. 63, on the school buildings of the Native College, Madura (which were exclusively used for charitable purposes), and was paid by the managers of the college, who sued in the Small Cause Court to recover the amount :—*Held*, that the tax was illegal and the plaintiffs were entitled to recover. FISCHER v. TWIGG, 21 M. 367 ... 616

(4) *S.* 189—*Keeping a private cart-stand without a license.*—It is not necessary, in order to establish the offence of using a place as a cart-stand without a license under District Municipalities Act IV of 1884 (Madras), s. 189, to prove that the cart-stand is offensive or dangerous, or that fees are levied there. QUEEN-EMPRESS v. AYYAKANNU MUDALI, 21 M. 293=1 Weir 738 ... 563

(5) *Ss.* 263, 264—*Crim. Pro. Code—Act* X *of* 1882, *ss.* 16, 350—*Bench of Magistrates.*—A trial on the charge of making an encroachment upon public land under District Municipalities Act (Madras), 1884, ss. 167, 263 and 264, was begun before a Bench of seven Magistrates, and ended in a conviction by five of the Magistrates in the absence of the other two. It appeared that the Municipal Council had passed no resolution under District Municipalities Act, s. 264 :—*Held*, that on the facts of the case, the conviction under s. 263 was right, and that it was not invalidated by the absence at the end of the trial of two of the Magistrates before whom it had begun. *Quære*; Whether a charge under s. 264 would lie in the absence of a resolution passed by the Municipal Council. KARUPPANA NADAN v. CHAIRMAN, MADURA MUNICIPALITY, 21 M. 246=1 Weir 751=2 Weir 17 ... 530

**Act V of 1884 (Local Boards, Madras).**

(1) *S.* 43—*Public servant—Sanitary Inspector.*—A Sanitary Inspector appointed by the Local Board is a public servant within the meaning of Local Boards Act, Madras, 1884, s. 43. QUEEN-EMPRESS v. TIRUVENGADA MUDALI, 21 M. 428=1 Weir 792 ... 660

(2) *Ss.* 77, 78, 81, 94, 163—*Penal Code—Act* XLV *of* 1860, *ss.* 99, 186, 353—*Service of notice of demand of house-tax—Omission to fill up the house-register completely—Illegal distraint—Resistance to distraining officer.*—A notice of demand of a house-tax under the Local Boards Act V of 1884, (Madras) was affixed to the house. The owner, who was a potter and

**Act V of 1884 (Local Boards, Madras)—(*Concluded*).** PAGE

cultivator by occupation, was in the village at the time. He did not pay the tax. A warrant of distress was issued, the house-register not having been completely filled up, and a bucket and spade belonging to the defaulter were attached. The defaulter successfully resisted the distraint:—*Held*, that the provisions of the Act had been sufficiently complied with as regards the preliminary steps for making the demand and the service of notice, and the fact that the spade and the bucket were protected from attachment under s. 94 did not justify the resistance, and accordingly that the defaulter was guilty of offences under Penal Code, ss. 186 and 353. QUEEN-EMPRESS v. POOMALAI UDAYAN, 21 M. 296=1 Weir 135 & 792 ... 565

(3) *S.* 87. *cl.* 3—*Government stores—Equipages.*—Stores and carts belonging to the Government jails come within the words 'Government Stores and Equipages' in cl. 3—s. 87, Act V of 1884, and are free from tolls under that Act. QUEEN-EMPRESS v. KUTTI ALI, 20 M. 16=1 Weir 793 ... 12

(4) S. 188. See PENAL CODE (ACT XLV OF 1860), 20 M. 1.

**Act I of 1886 (Abkari, Madras).**

(1) *Ss.* 56, 64—*Holder of a license and his servants.*—The words "being holder of a license" in Abkari Act, s. 56, must be taken to include any person in the employ, or for the time being acting on behalf of the holder of a license. QUEEN-EMPRESS v. MAHALINGAM SERVAI, 21 M. 63=1 Weir 648 ... 401

**Act I of 1887 (Malabar Compensation for Tenants' Improvements).**

(1) *Timber trees.*—In a suit to redeem a kanom of land on which timber has grown, the jenmi is not entitled to be credited with half the value of the timber. ACHUTAN NAYAR v. NARASIMHAM PATTER, 21 M. 411 ... 648

(2) *Ss.* 4, 7—*Improvements made before and after 1st January* 1886.—Malabar Compensation for Tenants' Improvements Act, 1887. s. 7, cannot be construed retrospectively so as to invalidate agreements made with respect to improvements prior to the passing of the Act. In computing, therefore, the value of improvements made by a tenant in Malabar, who was let into possession under an agreement before the passing of the Act, it is necessary to ascertain the value of improvements made by him before the 7th January 1887, calculated according to the scales specified in his contract, and also the value of improvements effected subsequently, calculated under the provisions of the Act. VIRU MAMMAD v. KRISHNAN, 21 M. 149 ... 462

(3) *Ss.* 6 (*c*) 7—*Tenant's agreement in* 1890 *not to claim compensation for improvements already made—Reduction of rent—Claim to make deduction from the value of improvements on account of reduction of rent.*—In an ejectment suit relating to agricultural property in Malabar, it appeared that the tenant was in possession under an agreement executed in 1890, in which it was recited that the tenant's father had been let into possession thirty years previously at a certain rate of rent and had made improvements on the land, and the defendant agreed to hold at a lower rate of rent, and not to demand compensation for the previous improvements. The plaintiff relied on the last-mentioned provisions of the agreement which admittedly related to improvements made since January 1886:—*Held*, that the provisions relied on by the plaintiff were invalid under Malabar Compensation for Tenants' Improvements Act, 1887, s. 12:—

**Act I of 1887 (Malabar Compensation for Tenants' Improvements)—(*Cld.*).** PAGE

*Held*, also per SUBRAMANIA AYYAR, J. (DAVIES, J. *diss.*) that there was no reduction of rent or other advantage given by the landlord to the tenant within the meaning of s. 6 (c), and accordingly that the plaintiff was entitled to evict only on payment of the value of improvements free from any deduction. UTHUNGANAKATH AVUTHELA v. THAZHATHARAYIL KUNHALI, 20 M. 435=7 M.L.J. 203 ... 308

**Act I of 1889 (Village Courts, Madras).**

(1) Succession Certificate Act—Act VII of 1889.—See SUCCESSION CERTIFICATE ACT (VII OF 1889), 21 M. 115.

(2) *S.* 13, *proviso* 3—*Civ. Pro. Code*, *ss.* 617, 647—'*Land' includes' house.*— In Act I of 1889, s. 13, proviso 3, the word 'land' includes land covered by a house and consequently a suit for house-rent unless due under a written contract signed by the defendant is not cognizable in a Village Munsiff's Court. NARAYANAMMA v. KAMAKSHAMMA, 20 M. 21 ... 15

(3) S. 73—*Power of District Munsif on revision.*—A District Munsif has no jurisdiction to reserve the decree of a Village Munsif on a question of evidence; he can only revise the proceedings of Village Courts on the grounds mentioned in s. 73 of the Village Courts Act. GIDDAYYA v. JAGANNATHA RAU, 21 M. 363 ... 613

**Actionable Claim.**

See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 M. 253.

**Adjournment.**

See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 403.

**Adjustment.**

See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 369, 21 M. 356, 409.

**Adultery.**

See CRIM. PRO. CODE (ACT X OF 1882), 20 M. 470.

**Adverse Possession.**

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 153.

(2) See HINDU LAW (SUCCESSION), 20 M. 493.

(3) See LIMITATION, 20 M. 6, 21 M. 169.

(4) See LIMITATION ACT (XV OF 1877), 21 M. 53, 278.

**Agency.**

See CONTRACT ACT (IX OF 1872), 20 M. 97.

**Amendment.**

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 234.

(2) See EJECTMENT, 21 M. 288.

**Appeal.**

1.—GENERAL.

2.—CRIMINAL.

3.—SECOND APPEAL.

———**1.—General.**

(1) See ACT XX OF 1863 (RELIGIOUS ENDOWMENTS), 21 M. 179.

(2) See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), 21 M. 232.

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(3) See BREACH OF TRUST, 20 M. 398.

(4) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 152, 366, 407, 21 M. 29, 152, 352, 405, 416, 417, 421.

(5) See COURT FEES ACT (VII OF 1870), 21 M. 269, 371.

(6) See LIMITATION ACT (XV OF 1877), 21 M. 228.

(7) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 20 M. 442.

**———2.—Criminal.**

See CRIM. PRO. CODE (ACT X OF 1882), 20 M. 87, 21 M. 114.

**———3.—Second Appeal.**

See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 467, 21 M. 234.

**Arbitration.**

See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 490.

**Arrears of Rent.**

(1) See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 20 M. 498.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 236.

(3) See LANDLORD AND TENANT, 21 M. 138.

**Arrears of Revenue.**

See ACT II OF 1864 (REVENUE RECOVERY, MADRAS), 20 M. 253, 20 M. 494.

**Attachment.**

(1) See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 20 M. 498.

(2) See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 21 M. 239.

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 236, 393.

(4) See CRIM. PRO. CODE (ACT X OF 1882), 20 M. 88.

(5) See DECREE, 20 M. 157.

(6) See INSOLVENCY, 20 M. 452.

(7) See PENAL CODE (ACT XLV OF 1860), 21 M. 78.

**Award.**

(1) See CIV. PRO CODE (ACT XIV OF 1882), 20 M. 89, 490, 21 M. 405.

(2) See COURT FEES ACT (VII OF 1870), 21 M. 269.

**Benamidar.**

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 353, 388.

(2) See NEGOTIABLE INSTRUMENT, 21 M. 30.

(3) See SPECIFIC RELIEF ACT (I OF 1877) 21 M. 231.

**Benami Transaction.**

(1) See ACT II OF 1884 (REVENUE RECOVERY, MADRAS), 20 M. 494.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 349, 20 M. 362, 21 M. 7.

(3) See NEGOTIABLE INSTRUMENT, 21 M. 30.

(4) See SPECIFIC RELIEF ACT (I OF 1877), 21 M. 373.

**Bench of Magistrates.**

See ACT IV OF 1884 (DISTRICT MUNICIPALITIES, MADRAS,) 21 M. 246.

**Breach of Contract.**

See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 369.

**Breach of Trust.** PAGE

*Suit between co-trustee—Limitation Act—Act* XV *of* 1877, *s.* 10—*Court Fees Act —Act* VII *of* 1870, *s.* 5—*Objection as to Court fees paid on appeal.*—The plaintiffs and defendants, together with one Subbaraya Pai who died in 1884, were trustees of a temple, having been appointed by the committee under Act XX of 1863. For some years before his death Subbaraya Pai was left in exclusive management. Subsequently the defendants were in sole management of the temple until 1891, when the plaintiffs brought the present suit charging that the defendants had excluded them from the right of management, and claiming that they should make good sums lost to the institution by reason of breaches of trust alleged to have been committed by them. Some of the breaches of trust took place before 1884. Of the others, which took place subsequently, some consisted in improper dealings with the temple property to the detriment of the temple and to the advantage of certain relatives of the defendants. The plaintiffs also asked for an injunction to restrain the defendants from excluding them from management:—*Held*, (1) that, in the absence of evidence of an absolute denial by the defendants of the plaintiff's right to act as trustees, the suit for an injunction was not barred by limitation; (2) that the suit could not be regarded as a suit by the beneficiaries and was not within the operation of Limitation Act, s. 10; (3) that the suit was not maintainable in respect of breaches of trust committed in the lifetime of the deceased manager, as being to that extent barred by limitation, and also for the reason that such breaches were not more imputable to the defendants than to the plaintiffs; (4) that even if it had been proved that the community interested in the temple had sanctioned the acts of the defendants now complained of, that circumstance would not suffice to excuse the defendants; (5) that the defendants were liable to make good the loss occasioned by any breach of trust committed within six years of the date when the suit was instituted even in the absence of fraud, and that, in estimating such loss, prospective loss should be assessed: *Held further*, that an objection taken on behalf of respondents at the hearing of an appeal as to the amount of Court-fee stamp affixed to the petition of appeal to the High Court, cannot be entertained. RANGA PAI v. BABA, 20 M. 398 ... 283

**Burden of Proof.**

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 313.

**Cart-stand.**

See ACT IV OF 1884 (DISTRICT MUNICIPALITIES, MADRAS), 21 M. 293.

**Cause of Action.**

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 153.

(2) See LIMITATION ACT (XV OF 1877), 20 M. 48.

(3) See SPECIFIC PERFORMANCE, 20 M. 19.

(4) See SPECIFIC RELIEF ACT (I OF 1877), 21 M. 373.

**Cause of like nature.**

See LIMITATION ACT (XV OF 1877), 20 M. 48.

**Certified Purchaser.**

See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 7.

**Ceylon.**

See FOREIGN JUDGMENT, 20 M. 112.

**Charge Sheets.** PAGE

See CRIM. PRO. CODE (ACT X OF 1882), 20 M. 189.

**Charitable Endowments.**

See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 10.

**Charity.**

See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 10, 406.

**City Civil Court.**

See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 398.

**Civ. Pro. Code (Act XIV of 1882).**

(1) S. 2.—*Appeal against order rejecting an insufficiently stamped appeal.*—An appeal-petition having been presented bearing an insufficient Court-fee stamp was returned to the appellant. After the period of limitation had expired, it was presented again bearing a sufficient stamp together with a petition that it be received. The appellate Court made an order refusing to admit the appeal :—*Held*, that no appeal lay to the High Court. VENKATARAYADU v. RANGAYYA APPA RAU, 21 M. 152 ... 464

(2) S. 2—*Suits Valuation Act—Act VII of 1887, s. 8—Suit for partition—Order by Appellate Court directing that the plaint be returned—Appeal against such order—Amendment of memorandum of appeal.*—The plaintiff sued in the Court of the District Munsif to recover his share of family property. The amount of the property exceeded, but the amount of the share claimed was within the pecuniary limit of the jurisdiction of the District Munsif who passed a decree for the plaintiff. On appeal it was held that the suit was not within the jurisdiction of the Court. The decree accordingly was reversed, and it was ordered that the plaint be returned for presentation to the proper Court. The plaintiff preferred this second appeal to the High Court :—*Held*, that the lower appellate Court had not passed a decree within the meaning of the Civ. Pro. Code, s. 2, and that plaintiff's remedy was not by way of a second appeal, but he should have proceeded under Civ. Pro. Code, s. 588. The petition of appeal having been allowed to be amended in accordance with this ruling :—*Held*, that the Court of first instance had jurisdiction to entertain the suit. CHINNASAMI PILLAI v. KARUPPA UDAYAN, 21 M. 234 ... 521

(3) Ss. 2, 588—*Religious Endowments Act—Act XX of 1863, s. 18—Order for payment of plaintiffs' costs out of the funds of the institution—Appeal on behalf of the institution.*—A suit having been instituted under Religious Endowments Act, 1863, s. 14, *bona fide*, in the interests of a Hindu temple, the plaintiffs desired to withdraw the suit with liberty to sue again and an order was made permitting them to do so and directing that the costs be paid from the funds of the institution :—*Held*, that no appeal lay against the order as to costs. RAMAKISSOOR DOSSJI v. SRIRANGA CHARLU, 21 M. 421=8 M.L.J. 74 ... 655

(4) S. 12—*Suit for money—Application by defendant for an account of dealings with plaintiff—Defendants' right to bring a separate suit for an account.*—In a suit for money the defendant admitted that there had been money dealings between him and plaintiff, but averred that the taking of an account would show that the plaintiff was indebted to him. The Court dismissed the plaintiff's suit, but declined to take an account against the plaintiff ;—*Held*, that the defendant was not entitled to have an account taken in the suit and that Civ. Pro. Code, s. 12, would not have

**Civ. Pro. Code (Act XIV of 1882)—(*Continued*).** PAGE

precluded him from suing for an account during the pendency of the plaintiff's suit. RAMALINGA CHETTI v. RAGUNATHA RAU, 20 M. 418 ... 297

(5) *Ss.* 12, 13—Res judicata—*Transfer of Property Act—Act IV of* 1882, *ss.* 91, 95—*Redemption—Ejectment suit by mortgagor—Subsequent suit for redemption.*—A zamindar mortgaged his estate under four successive instruments to the same creditor who was subsequently placed in possession. On the death of the mortgagor, his son, claiming to have succeeded by the law of primogeniture to the zamindari as an impartible estate, sued to eject the mortgagee; and a decree was passed declaring what was the sum due on a date named and how far it was binding on the estate and decreeing that, on payment of what might be due on taking an account, the mortgagee should give up possession. Many years later the zamindar applied to the Court to carry out this decree, and a like application was put in by the present plaintiff to whom seven-eighths of the equity of redemption had been assigned. Both of these applications were rejected in the High Court as barred by limitation, and the applicants applied for leave to appeal to the Privy Council against the order of the High Court. Meanwhile the plaintiff brought the present suit to redeem the mortgages of the late zamindar:—*Held*, (1) that the suit was not barred under Civ. Pro. Code, s. 12, by reason of the pendency of the application for leave to appeal to the Privy Council; (2) that, as there was no decree for foreclosure passed in the previous suit which had been treated as a suit for redemption, the present suit was not precluded by the decree therein; (3) that the findings in the previous suit as to the amount of the debt and the extent to which it bound the estate were *res judicata*; (4) that the plaintiff was entitled to redeem the whole mortgages, although he was assignee of only seven-eighths of the equity of redemption, as the owner of the remaining one-eighth was joined as defendant and did not apply to be made plaintiff. NAINAPPA CHETTI v. CHIDAMBARAM CHETTI, 21 M. 18 ... 369

(6) *S.* 13—*Decision of Revenue Court*—'Res judicata'.—A zamindar distrained for rent under the Rent Recovery Act of 1865. Thereupon the tenant filed a summary suit under that Act in a Revenue Court, and the distraint was annulled on the ground that the zamindar had not tendered a proper patta as required by s. 7. The zamindar now sued in the Court of the District Munsif to recover the arrears of rent:—*Held*, that the question of the propriety of the patta tendered was not *res judicata*. RANGAYYA APPA RAU v. RATNAM, 20 M. 392 ... 279

(7) *S.* 13—*Hindu Law—Po-Brahman—Alienation by widow for religious purpose*—'Res judicata'—*Decision on title in proceedings under Land Acquisition Act*, 1870.—When a Po-Brahman receives a salary for the performance of his duties, a gift to him by the widow of the person whose exequial rites he has been appointed to perform to reward him for having performed any of those exequial rites is not a gift binding on the reversioners. In proceedings under the Land Acquisition Act, 1870, to apportion the compensation payable, a decision by the Judge on a question of title does not operate as *res judicata* between the parties to those proceedings. MAHADEVI v. NEELAMANI, 20 M. 269 ... 191

(8) S. 13—Res judicata—Limitation Act—Act XV of 1877, sch. II, arts. 115, 116—Covenant implied in registered sale-deed—Transfer of Property Act—Act IV of 1882, s. 55—Implied covenant for title—Damages for breach—See LIMITATION ACT (XV OF 1877), 21 M. 8.

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(9) S. 13, Expl. II—Limitation Act—Act XV of 1877, s. 28, sch. II, art. 124—Right to a temple office and its endowments—Adverse possession—Res judicata—See LIMITATION ACT (XV OF 1877), 21 M. 278

(10) Ss. 13, 42, 43, 462—*Sanction to compromise a suit against a minor—Suit to set aside a consent decree for want of sanction—Previous suit to set aside decree on the ground of fraud on guardian* ad litem.—A suit instituted in 1879 against a minor was compromised by the plaintiff and the guardian *ad litem*, and a decree for the plaintiff was passed by consent. In 1882 the minor sued by his next friend to have the consent decree set aside on the ground that it had been obtained by fraud practised on the guardian *ad litem*. That suit was dismissed. In 1884 an application was unsuccessfully made in the original suit objecting that the compromise had been entered into without the sanction of the Court. The minor having attained majority now sued to have the consent decree set aside on the ground that it had not been sanctioned by the Court under Civ. Pro. Code, s. 462 :—*Held*, (1) that the Court by passing the consent decree had not, *ipso facto*, sanctioned the compromise under Civ Pro. Code, s. 462, and that the present suit was not barred by the order dismissing the application in 1884 ; (2) that the suit was barred by the decree in the suit of 1882 for the reason that the want of sanction might and ought to have been made a ground of attack in that suit. ARUNACHALAM CHETTY v. MEYYAPPA CHETTY, 21 M. 91=8 M.L.J. 28 ... 421

(11) Ss. 27, 53—*Amendment of plaint by bringing on a new plaintiff on second appeal—Construction of will—Appointment of executors by implication.*—Plaintiffs sued in 1894 to recover property belonging to the estate of a testator, claiming to be his executors under a will. The property was alleged to have been entrusted by the testator in 1893 to the defendant. The will contained no express appointment of executors, but it provided that the plaintiffs should take care of the estate during the minority of a son who was to be adopted to the testator, and imposed upon them the duty of providing for the maintenance of persons therein named :—*Held*, (1) that the plaintiffs were not appointed executors by implication ; (2) that under the circumstances of the case, the plaint should be amended on second appeal in 1897, by substituting the adopted son as plaintiff, with one of the present plaintiffs as his next friend. SESHAMMA v. CHENNAPPA, 20 M. 467 ... 331

(12) S. 30—*Hindu Law—Agreement on adoption—Charitable endowments—Interest sufficient to support a suit relating to charity.*—A Hindu shortly before his death directed his wife and mother to employ part of his property for the maintenance and upkeep of a charitable institution, being a choultry where Japta Brahmans and travellers were fed, and at the same time empowered his wife to make an adoption, declaring that the adopted son should have no interest in the property devoted to the charitable purpose. On his death the widow and mother executed a document, relating to the property, to give effect to the wishes of the deceased for the benefit of Brahmans ; and three years later the widow took in adoption a boy whose father acquiesced in the deceased man's dispositions. The charitable trust having been neglected and the adoptive son having taken possession in his own right of the lands constituting the endowment, two Brahman residents of the neighbourhood who had obtained leave under s. 30, Civ. Pro. Code, instituted a suit as representing the Brahman community

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at large to remove the widow from the office of trustee, to have the adopted son declared ineligible for that office and for the appointment of a new trustee:—*Held*, that the plaintiffs possessed sufficient interest in the charity to enable them to maintain the suit, and that they were entitled to the relief claimed by them. GANAPATI AYYAN v. SAVITHRI AMMAL, 21 M. 10 ... 364

(13) *Ss.* 30, 539—*Public charity—Suit by trustee.*—The trustee of a temple sued to recover, from the representatives of the trustee of a fund constituted for special purposes in connection with the temple worship, a sum of money misappropriated by him and to obtain the appointment in his place of himself or some other fit person. The plaintiff obtained leave to sue under Civ. Pro. Code, s. 30, but no sanction had been obtained under s. 539:—*Held*, that the suit was maintainable. NELLAIYAPPA PILLAI v. THANGAMA NACHIYAR, 21 M. 406=8 M.L.J. 119 ... 644

(14) S. 31—Misjoinder—Tenants in common—Benami mortgage—Suit by some of the heirs of the real mortgagee—Evidence of benami—Limitation—Joinder of causes of action—Specific Relief Act—Act I of 1877, s. 42—See SPECIFIC RELIEF ACT (I OF 1877), 21 M. 373.

(15) *S.* 32—*Joinder of parties—Change in character of suit.*—In an ejectment suit by a landlord against his tenant, the Court should not bring on to the record the person from whom the plaintiff holds the land, nor persons claiming to hold it from a third party, nor such third party. SANKARAN NARAYANAN v. ANANTHANARAYANAYYAN, 20 M. 375 ... 267

(16) *Ss.* 32, 45, 46—*Dismissal of suit against one defendant without trial after first hearing.*—The plaintiff sued for damages for the infringement of certain hereditary rights claimed by him in connection with a temple. The first defendant was a magistrate, and it was alleged as the cause of action against him that he had disobeyed the instructions of his superiors and played into the hands of the other defendants by passing an illegal order. After issues had been framed the Judge without trial dismissed the suit with costs against the first defendant:—*Held*, that the order was illegal. SINGA REDDI v. MADAVA RAU, 20 M. 360 ... 257

(17) *S.* 43—*Limitation Act—Act XV of* 1877, *sch. II, arts.* 142, 144—*Suit for partition between co-owners—Possession of tenants—Adverse possession—Cause of action.*—The plaintiff was the Zamorin of Calicut, and he sued in 1887 for a moiety of certain property in Malabar alleged to belong in equal undivided shares to his stanom and that of the defendant and to be in the occupation of tenants. The cause of action was stated to have arisen in 1881 when partition was demanded by the zamorin and refused by the defendant. In some instances the tenants in occupation represented the family, a member of which was at one time admitted by the zamorin under a demise or kanom, and had attorned to the defendant; in other instances they were shown to have been admitted by the defendant on paying off the former tenant who had been admitted by the zamorin. In all these instances the defendant intended the tenant who attorned to him to hold as his tenant to the exclusion of any claim by the zamorin, but it was not shown that the zamorin had any notice of attempted usurpation on the part of the defendant. And on these facts the defence of limitation was raised on the ground that the land had been held for more than twelve years adversely to the zamorin. It appeared further that the zamorin had previously brought suits and obtained decrees for partition of certain par-

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cels of land as belonging equally to the two stanoms, the defendant in each suit being the present defendant and the tenant in occupation of the land then in question. And on these facts a further defence was raised under Civ. Pro. Code, s. 43 :—*Held*, (1) that Limitation Act, sch. II, art. 144, and not art. 142, was applicable to the suit, and that in the first class of cases referred to above, the tenancy under the zamorin had not been determined, and that in the second class, there had been no ouster of the zamorin, and that consequently the suit was not barred by limitation; (2) that the suit was not barred by Civ. Pro. Code, s. 43, by reason of the previous suits. ITTAPPAN v. MANAVIKRAMA, 21 M. 153=8 M.L.J.92 ... 465

(18) S. 43—*Rent Recovery Act (Madras)—Act VIII of* 1865, s. 18—*Suit by a landlord in the Court of the District Munsif for arrears of rent for two years—Subsequent attachment for rent of a third year accrued due at date of suit*:—A zamindar brought a suit in the District Munsif's Court to recover from a tenant on his estate the arrears of rent for two years. Rent for the third year was also due. No claim for it was included in the suit, but the landlord attached the land by summary process under the Rent Recovery Act to recover it. The tenants sued in the Revenue Court under the Rent Recovery Act to have the attachment set aside as illegal :—*Held*, that the zamindar was not precluded by Civ. Pro. Code, s. 43, from pursuing his remedies under the Rent Recovery Act and that the attachment was not illegal. RAJAH ESWARA DOSS v. VENKATAROYER, 21 M. 236 ... 522

(19) S. 43—*Transfer of Property Act, s.* 85—*Ejectment suit by a mortgagor's vendee against the purchaser under a mortgage decree—Subsequent suit to redeem.*—Certain land mortgaged to A was sold to B. A brought a suit on his mortgage without joining B as a party, obtained a decree for sale and became the purchaser under the decree. B then sued to eject him praying for a declaration that the sale was not binding on him. The suit having been dismissed, he now sued to redeem :—*Held*, that the suit was not barred under Civ. Pro. Code, s. 43, and the plaintiff was entitled to redeem. KUPPU NAYUDU v. VENKATAKRISHNA REDDI, 20 M. 82=6 M.L.J. 229 ... 57

(20) S. 44—Limitation Act—Act XV of 1877, s. 14—Cause of like nature—Misjoinder of causes of action—Want of leave—See LIMITATION ACT (XV OF 1877), 20 M. 48.

(21) S. 54—See LIMITATION ACT (XV OF 1877), 20 M. 319.

(22) Ss. 59, 140—*High Court Rules, Nos.* 39, 43, 44 *and* 47.—A defendant is entitled, under the High Court Rules, to be furnished with a copy of documents sued on, which are deposited with the plaint. HAJI MAHOMED ABDUL AZIZ BADSHA SAHIB v. SUBBA NAIDU, 21 M. 490 ... 703

(23) Ss. 78, 80, 82—*Substituted service—Duty of process-server.*—Mere temporary absence of a person to be served does not justify the process-server in affixing the summons to a door. It is the duty of the process-server to take pains to find out the person to be served in order that, if possible, personal service may be effected. SUBRAMANIA PILLAI v. SUBRAMANIA AYYAR, 21 M. 419 ... 653

(24) Ss. 80, 101, 108 — Ex-parte *decree—Substituted service of summons.*—A decree was passed *ex-parte* against defendants on whom the summons was served by affixing it to their house. The defendants who had applied unsuccessfully under Civ. Pro. Code, s. 101, to be heard in answer to the

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suit, now preferred a petition under s. 108 that the decree be set aside. This application was dismissed. On an appeal by one of the defendants :— *Held*, as it appeared from the serving officer's return that, according to the information given to him, there was no prospect of his being able to serve the defendant personally within a reasonable time, that he was justified in affixing the summons to the door of the house. *Per cur* :— The fact that an order under s. 101 has been made against a defendant and has not been appealed against is no objection to an application being made by him under s. 108. SANKARALINGA MUDALI v. RATNASABHAPATI MUDALI, 21 M. 324=8 M.L.J. 58 ... 585

(25) S. 158—*Adjustment of decree out of Court—Agreement not certified to Court —Action for damages.*—A decree for partition of family property was passed in favour of two plaintiffs. One of the plaintiffs having died before execution, a question arose between the survivor and one of the defendants as to the devolution of his interest, and the decision was in favour of the surviving plaintiff. The contending parties made an arrangement, according to which some of the land representing the share of the deceased plaintiff should be given to the defendant. This agreement was not certified to the Court and the decree was executed at the instance of the surviving plaintiff who subsequently refused to give effect to the arrangement. The then defendant now sued in the alternative for possession of the land awarded to him or for damages :—*Held*, (1) that the plaintiff's claim for the land was not maintainable ; (2) that the claim for damages for breach of the agreement was maintainable. KRISHNASAMI AYYANGAR v. RANGA AYYANGAR, 20 M. 369=7 M.L.J. 71 ... 262

(26) S. 158—*Application for succession certificate—Order for costs of adjournment against opposing party—Effect of non-compliance with such order.*— A widow applied for a succession certificate to her late husband. The application was opposed by his brother who claimed to have been undivided from him. The matter came on for hearing, but was adjourned on his application, he being ordered to pay the costs. He failed to pay the costs and the certificate was issued to the widow :—*Held*, that s. 158 of the Civ. Pro. Code was inapplicable to the case in the absence of a specific order making the payment of costs a condition precedent to the hearing of the evidence of the party in default. VIRABHADRAPPA CHETTI v. CHINNAMMA, 21 M. 403=8 M.L.J. 189 ... 642

(27) S. 209—Transfer of Property Act—Act IV of 1882, s. 86—Mortgage decree—Interest—Contract rate—Subsequent interest—See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 M. 364.

(28) S. 214—Limitation Act—Act XV of 1877, s. 28, sch. II, art. 10—Right of pre-emption asserted by one in possession under an otti mortgage in Malabar—See LIMITATION ACT (XV OF 1877), 20 M. 305.

(29) S. 215—*Decree for account of dissolved partnership—Taking of accounts.*— In a suit for an account of a dissolved partnership a decree should be passed under Civ. Pro. Code, s. 215, in accordance with form No. 132 in sch. IV ; and it should direct an account to be taken of the dealings and transactions between the parties and of the credits, property and effects due and belonging to the late partnership, and it should direct the appointment of a receiver of the outstanding debts and effects. Observations on the procedure to be adopted and the burden of proof on the taking of the account. THIRUKUMARESAN CHETTI v. SUBBARAYA CHETTI, 20 M. 313 ... 222

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(30) *Ss.* 224, 311—*Application to set aside sale—Effect of fraud—Auction-purchaser no party to fraud—Absence of certificate under s.* 224—*Mere irregularity.*—A judgment-debtor cannot have a Court sale set aside on the ground of fraud in the absence of proof that the auction-purchaser was a party to the fraud, and that the fraud came to the judgment-debtor's knowledge subsequent to the confirmation of the sale. The omission to transmit to the Court executing the decree the certificate required by s. 224, Civ. Pro. Code, is a mere irregularity which would not vitiate the sale. ABBUBAKER SAHEB v. MOHIDIN SAHEB, 20 M. 10 ... 7

(31) *S.* 232—*Specific Relief Act—Act I of* 1877, *s.* 56, *cl.* (*b*)—*Trusts Act—Act II of* 1882, *ss.* 91, 95—*Decree obtained on a benami mortgage by benamidar—Suit by real mortgagee—Declaration—Injunction.*—A mortgaged land to B as either agent or benamidar for C. B sued on the mortgage and obtained a decree. C now sued A and B for a declaration that he was entitled to the benefit of the decree and had the right to execute it, and for an injunction restraining A from paying the money to B and B from receiving the money from him :—*Held*, that the plaintiff was entitled to the declaration but not to the injunction. SETHURAYAR v. SHUNMUGAM PILLAI, 21 M. 353=7 M.L.J. 279 ... 605

(32) *S.* 232—*Transfer of decree—Benami transfer.*—If a decree is transferred to one as benamidar for the actual purchaser, the latter is entitled to execute the decree and his right course is to apply under Civ. Pro. Code, s. 232. MANIKKAM v. TATAYYA, 21 M. 388=8 M.L.J. 48 ... 631

(33) *Ss.* 243, 588—*Stay of execution pending suit between decree-holder and judgment-debtor—Stay of execution refused—Appeal.*—An appeal lies from an order refusing stay of execution under Civ. Pro. Code, s. 243, pending a suit between a decree-holder and his judgment-debtor. LINGUM KRISHNA BHUBATI DEVU v. KANDULA SIVARAMAYYA, 20 M. 366 ... 260

(34) *S.* 244 (*c*)—*Parties to the suit—Auction purchaser.*—Land was sold in execution of a decree of a Subordinate Court, and a sale certificate was issued. A question having subsequently arisen as to what had actually been the subject of the sale, the auction-purchaser applied to the Court, and an order was made by which the sale certificate was amended. The judgment-debtor appealed to the District Court joining the decree-holder and the auction-purchaser as respondents. The appeal was dismissed on the ground that no appeal lay :—*Held*, that the question was not one which could be determined under Civ. Pro. Code, s. 244, and consequently the decision of the lower appellate Court was right. MAMMOD v. LOCKE, 20 M. 487 ... 345

(35) *S.* 244 (*c*)—*Party to the suit.*—A defendant, who had been exonerated from a suit, is not a party within the meaning of Civ. Pro. Code, s. 244 (*c*), and a suit by the plaintiff for contribution for his share of the costs of execution is not barred under that section. GADICHERLA CHINA SEETAYYA v. GADICHERLA SEETAYYA, 21 M. 45 ... 388

(36) *Ss.* 244, 257 (*a*)—*Representative of judgment-debtor—Agreement for satisfaction of judgment debt.*—A money decree was passed against a zamindar by the High Court in 1883, and it was transferred to the District Court for execution. The decree-holder attached and prepared to bring to sale certain villages of the judgment-debtor. These villages were included in a mortgage subsequently executed by the judgment-debtor in favour of third parties. Both before and after the mortgage the decree-holder received

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from the zamindar certain sums in consideration of his agreeing to postponements of the sale ; also it was agreed between them at a date subsequent to the mortgage that interest should be computed at a higher rate than that provided by the decree. Subsequently the decree-holder sought to bring the land to sale, and in computing the amount then due gave credit for none of the sums so received and calculated interest at the enhanced rate. The mortgagee objected that the computation was erroneous in both these respects and the District Judge upheld his objection. The judgment-debtor took no part in the contest :—*Held* (1) that the mortgagee was a representative of the judgment-debtor within the meaning of Civ. Pro. Code, s. 244, and that an appeal lay against the order of District Judge, (2) that the District Court not being the Court which passed the decree had no power to sanction the agreements under s. 257 (*a*), and the decision was right. PARAMANANDA DAS v. MAHABEER DOSSJI, 20 M. 378=7 M.L.J. 89 ... 269

(37) *Ss.* 244, 258, 311—*Uncertified adjustment out of Court with a decree-holder—Subsequent execution—Fraud of decree-holder.*—An adjustment was made out of Court between a decree-holder and a judgment-debtor in August 1893, but it was not certified to the Court. The decree-holder falsely stated to the judgment-debtor's agent that the requisite petition certifying the adjustment had been presented ; but nevertheless he proceeded with execution, applied for and obtained leave to bid at the Court-sale and himself purchased the property in September. The judgment-debtor preferred petitions in September and November praying that the sale be set aside :—*Held*, that the judgment-debtor was entitled to prove the adjustment, and to have the sale set aside. RAMAYYAR v. RAMAYYAR, 21 M. 356 ... 608

(38) *Ss.* 244, 310A—*Right of a mortgagee to the benefit of s.* 310 *A—Appeal against order adverse to mortgagee.*—A mortgagee being a party to a suit objected that the mortgage premises had been attached and sold in execution of the decree and applied to have the sale set aside on payment being made by him under Civ. Pro. Code, s. 310-A. The purchaser was the decree-holder. The application having been refused by the Courts of First Instance and First Appeal, the applicant appealed to the High Court :—*Held*, that the appeal was maintainable and the appellant was entitled to the relief sought. SRINIVASA AYYANGAR v. AYYATHORAI PILLAI, 21 M. 416=8 M.L.J. 54 ... 651

(39) *Ss.* 244, 317—*Purchase by a benamidar with funds belonging to a joint Hindu family—Right of member of family not being a party to* benami *transaction to sue for his share.*—A Hindu sued for partition of his share of the family property and obtained a decree which he partially executed. He then died without issue leaving a widow. The rest of the family remained undivided, and the plaintiff was born into it after the decree was passed. Some of the members of the family arranged for the purchase of the late decree-holder's property with their money *benami* for them and for a similar purchase of other portions of the family property at Court sales held in further execution of decree. The plaintiff now sued for partition of *inter alia* those portions of the family property which had been the subject of the *benami* transactions :—*Held*, that the plaintiff was entitled to share therein and was not precluded from asserting his right by Civ. Pro. Code, s. 244, or s. 317. MINAKSHI AMMAL v. KALIANARAMA RAYER, 20 M. 349=7 M. L. J. 213 ... 248

(40) *Ss.* 244, 311, 588—*Execution proceedings at instance of attaching creditor—Party to a suit—Right of appeal—Irregular sale.*—A attached a decree

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which B, his judgment-debtor, had obtained against C, and in execution thereof he brought to sale land belonging to C. After the publication of the proclamation of sale, one of the advertised lots was sub-divided into various lots for the purposes of the sale. B applied to have the sale set aside, and his application was refused: *Held*, that B had a right of appeal under Civ. Pro. Code, s. 311, and not under s. 244, but that the sub-division of the lots was no irregularity and the appellant was not entitled to the relief sought by him. SAMI PILLAI v. KRISHNASAMI CHETTI, 21 M. 417 = 8 M.L.J. 77 ... 652

(41) *Ss.* 244, 337 (*a*)—*Order directing the release of judgment-debtor—Appeal.*—A judgment-debtor, who had been arrested in execution of a decree of a District Munsif, made an application for his release under Civ. Pro. Code, s. 337 (*a*), and his application was granted: *Held*, that an appeal lay against the order granting the application. ABDUL RAHIMAN v. MAHOMED KASSIM, 21 M. 29 ... 377

(42) *S.* 252—*Legal representative—Suit against the heir and possessor of the assets of a deceased person.*—Where a party is sued for money as the heir and possessor of the assets of a deceased debtor, and it is proved that he has received sufficient assets to meet the debt, a personal decree therefor can be passed against him. NATHURAM SIVIJI SETT v. KUTTI HAJI, 20 M. 446 ... 316

(43) *S.* 258-A—*Adjustment out of Court—Subesequent execution by decree-holder—Suit to recover money paid on adjustment.*—It was agreed between a decree-holder and the judgment-debtors that the former should accept Rs. 200 which was paid in full satisfaction of the decree, and should certify the adjustment to the Court, and that an attachment already placed on the judgment-debtor's property should be raised. The decree-holder accepted the money, but did not carry out his part of the agreement, and more than two years later applied for execution which was ordered to issue, the judgment-debtor's objections being dismissed as out of time. The judgment-debtors now sued in a Small Cause Court to recover the money paid to satisfy the decree: *Held*, that the plaintiffs were entitled to recover. PERIATAMBI UDAYAN v. VELLAYA GOUNDAN, 21 M. 409 = 8 M.L.J. 51 ... 646

(44 *S.* 266—*Wages of private servant—Attachment.*—The wages of a private servant cannot be attached in whole or in part before they become due and a debt exists. AYYAVAYYAR v. VIRASAMI MUDALI, 21 M. 393 ... 634

(45) *Ss.* 291, 311—*Material irregularity—Substantial loss.*—Where a material irregularity is proved to have occurred in the conduct of a Court sale and it is shown that the price realised is much below the true value, it may ordinarily be inferred that the low price was a consequence of the irregularity even though the manner in which the irregularity produced the low price be not definitely made out. When a sale is adjourned under s. 291, the provisions of that section must be followed with exactitude. VENKATASUBBARAYA CHETTI v. ZAMINDAR OF KARVETNAGAR, 20 M. 159 ... 112

(46) *S.* 295—*Rateable distribution—Decree for money—Mortgage decree.*—The plaintiff and defendant, respectively, held successive mortgages on the same land. The defendant obtained a decree on his mortgage against the land and in respect of any unrealized balance against the mortgagor, two months' time for redemption being given. The plaintiff then obtained a like decree. The defendant abandoned his claim on the mortgage

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premises and attached other property of the mortgagor. The plaintiff applied to execute his decree against the mortgage premises and the other property, but with regard to the latter his application was rejected. The defendant having brought to sale the property attached, the plaintiff applied under Civ. Pro. Code, s. 295, for rateable distribution which was refused. The plaintiff then brought to sale the mortgage premises, which did not realize the amount of the debt, and he now sued to recover the sum which would have been payable to him under s. 295: *Held*, that the plaintiff's decree was a decree for money within the meaning of s. 295, and that he was entitled to recover the sum less claimed; *Per cur*, the property ought not to have been sold and the money paid to the defendant until the mortgaged property had been sold and had been found insufficient to pay his debt. KOMMACHI KATHER v. PAKKER, 20 M. 107=7 M.L.J. 66 ... 75

(47) S. 310-A *(a)—Application to set aside sale—Deposit by judgment-debtor of the amount of debt—Poundage money.*—A judgment-debtor, whose land has been sold in execution, is entitled to have the sale set aside under Civ. Pro. Code, S. 310-A (*a*), if he deposits 5 per cent. of the purchase money including that deducted by the Court for poundage and fulfils the requirements of cl. (*b*) even though something more on account of the poundage was recoverable from him under the head of costs. MUTHU AYYAR v. RAMASAMI SARTIAL, 20 M. 158 ... 111

(48) Ss. 310-*A*, 315—*Application by a purchaser for refund.*—A house was attached and sold as the property of one against whom a decree of the Small Cause Court, Madras, had been passed. The property was brought to sale, and the purchase money was paid into the Madras City Civil Court. The sale was set aside under Civ. Pro. Code, s. 310-A. Part of the purchase money was attached in execution of subsequent decrees passed against the same defendant by the Samll Cause Court and was remitted to that Court under the attachment. On an application by the purchaser for the refund of the purchase money by the various persons who had received portions thereof: *Held*, that the City Civil Court had jurisdiction to entertain the application. VIRASAMI CHETTI v. LILADHARA VYASS, 21 M. 398 8 M.L J. 110 ... 638

(49) Ss. 311, 314—*Court-sale—Irregularity—Right of holders of other decrees to object.*—A zemindar mortgaged his estate to a Bank and the mortgagee obtained a decree in the High Court, in execution of which it was ordered that the zemindari should be sold village by village. Other persons held money decrees against the zemindar. One of them in execution of his decree had the zemindari put up for sale in one lot, subject to the Bank's mortgage, and with the leave of the Court purchased it himself. The other decree-holders applied to have the sale (which had not been confirmed) set aside on the ground of material irregularity in publishing the sale by which substantial injury was caused to them. The irregularities relied on were that the proclamation was not issued in the prescribed form, and did not state the extent of the property and the revenue assessed on it, or the amount of income derived from it, and no mention was made of the order of the High Court: *Held*, that the sale should not be confirmed. ATHAPPA CHETTI v. RAMAKRISHNA NAYAKAN, 21 M. 51 ... 392

(50) S. 317—*Certified purchaser—Assignment from a certified purchaser.*—A person taking an assignment from a certified purchaser at a Court-sale is

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not entitled, under Civ. Pro. Code, s. 317, to object to the maintainability of a suit to recover the land purchased, on the ground that the purchase was made benami. THEYYAVELAN v. KOCHAN, 21 M. 7=7 M.L.J. 290 ... 361

(51) *S.* 317—*Execution sale—Right to prove purchase* benami.—Certain property was mortgaged in 1881 and again in 1882. In 1883 the interest of one of the mortgagors in the property was brought to sale subject to the mortgages in execution of a decree against him, and was purchased by the assignor of defendant No. 6. In 1884 a decree for sale was obtained on the mortgage of 1882, neither defendant No. 6 nor his assignor having been brought on to the record. In execution of that decree the property now in question was purchased by the predecessor in title of the plaintiff who now brought this suit for redemption, averring that the purchase of 1883 was *benami* for the mortgagors: *Held*, that the plaintiff was not debarred by Civ. Pro. Code, s. 317, from proving this averment. KOLLANTAVIDA MANIKOTH ONAKKAN v. TIRUVALIL KALANDON ALIYAMMA, 20 M. 362 ... 257

(52) S. 365—Legal representative—Malabar Law—Adoption by the karnavan of a Marumakkatayam tarwad—Want of consent by the rest of the tarwad. See MALABAR LAW (ADOPTION), 20 M. 51.

(53) *S.* 373—*Suit withdrawn without liberty to bring a fresh suit—Subsequent suit for the same matter.*—In 1893 the plaintiff sued to eject the defendants alleging that they were in occupation of the land in question under a lease of 1880 from the late Zamorin of Calicut. The plaintiff's title rested on an instrument executed by him in 1892. It was objected that the instrument was not binding after the death of the grantor. The plaintiff thereupon withdrew his suit without obtaining leave to sue again. He subsequently obtained a like instrument from the present zamorin and sued again to eject the defendants: *Held*, that the second suit was not maintainable by reason of Civ. Pro. Code. s. 373. ACHUTA MENON v. ACHUTA NAYAR, 21 M. 35 ... 381

(54) *Ss.* 412, 622—*Dismissal of suit* in forma pauperis *without trial—Liability of plaintiff for Court fee—Revision.*—A plaintiff who sues *in forma pauperis* is liable to pay the stamp duty if his suit is dismissed without trial; and he may be ordered to do so under s. 622. COLLECTOR OF VIZAGAPATAM v. ABDUL KHARIM SAHIB, 21 M. 113=8 M.L.J. 4 ... 436

(55) *S.* 443—*Suit against a major defendant by guardian* ad litem—*Acquiescence.* The managing member of a Hindu family consisting of himself and two brothers, who were minors, mortgaged the ancestral property to secure a debt properly incurred by him in his capacity as manager. The mortgagee brought a suit upon the mortgage joining as defendants the three brothers; the two younger of whom were sued by the mortgagor as their guardian *ad litem*. A decree for the plaintiff having been passed the lands were sold in execution. The two younger brothers now sued to have the decree and the sale set aside as regards them, on the ground that they had both been of age at the date of the suit, and accordingly had been wrongly impleaded. It appeared that the elder plaintiff was in fact a major at the date of the previous suit, but he was aware, prior to the sale, of the suit and the execution proceedings, and still allowed his elder brother to conduct the defence and proceedings on his behalf: *Held*, that both plaintiffs were bound by the decree in the former suit. RAMACHARI v. DURAISAMI PILLAI, 21 M. 167 ... 474

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(56) S. 470—Interpleader suit—Act IX of 1887—Provincial Small Cause Courts Act, sch. II, arts. 11 and 14—Claim for compensation awarded under Land Acquisition Act. See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 20 M. 155.

(57) Ss. 521, 522, 526—*Application to file award—Objection that submission was revoked before award made—Jurisdiction of Court to determine objection—Subsequent suit to annul award.*—The plaintiff's case was that arbitrators, to whom differences between him and the defendant had been referred, had out of enmity to him and at the defendant's instance, made a fraudulent award on 17th February after he had revoked his submission and had antedated it as on 1st February; that the defendant had instituted proceedings under Civ. Pro. Code, Chap. XXXVII, and his objections to the above effect having been overruled, a decree was passed in terms of the award. He now sued to have it declared that neither the decree nor the award was binding: *Held*, that the Court had jurisdiction to determine the genuineness or validity of the award in the proceedings under Chap. XXXVII, and that the present suit was not maintainable. CHINTAMALLAYYA v. THADI GANGIREDDI, 20 M. 89=7 M.L.J. 61 ... 63

(58) S. 522—*Decree in accordance with an award—Appeal.*—A suit having been referred to an arbitrator, he made an award and a decree was passed, in accordance with it, in favour of the defendant. On an appeal by the plaintiff, it appeared that the award was *prima facie* legal and proper: *Held*, that no appeal lay against the decree. KOMBI ACHEN v. PANGI ACHEN, 21 M. 405 ... 643

(59) S. 525—*Date from which partition operates—Partition—Arbitration—Suit to enforce the award with an alternative claim for partition—Whether such suit maintainable.*—Disputes between the members of a Hindu family were referred to arbitrators who made an award as to how the whole of the property should be divided. In pursuance of the award part of the moveable property was divided. Subsequently one of the members of the family died. The plaintiff, another member of the family, now sued to enforce the award or in the alternative for partition: *Held*, (1) that the alternative claim for partition was barred by the award; (2) that the provisions of Civ. Pro. Code, s. 525, did not preclude the plaintiff from suing to enforce the award; (3) that the partition should be considered to have taken effect from the date of the award and consequently that the share allotted to the deceased member of the family passed to his heir. SUBBRAYA CHETTI v. SADASIVA CHETTI, 20 M. 490 ... 347

(60) S. 558—*Letters Patent, s. 15—Appeal under Letters Patent—Powers of Appellate Court under s. 588.*—A Judge of the High Court when hearing an appeal under Civ. Pro. Code, s. 588, against an erroneous order of remand under s. 562 may, if he thinks fit, pass a final decree in the suit instead of merely remanding the suit to the Lower Appellate Court. No appeal lies against such decree under Letters Patent, s. 15. SANKARAN v. RAMAN KUTTI, 20 M. 152=6 M.L.J. 232 ... 107

(61) S. 561—*Appeal dismissed for want of necessary parties—Memorandum of objections.*—The plaintiffs sued to recover possession of lands demised on kanom in Malabar. The defendants were the representatives of the mortgagee, and one (defendant No. 20) who claimed title to part of the land sought to be recovered. As to the last-mentioned part of the land, the plaintiffs obtained a decree for a portion of it only. The plaintiffs preferred an appeal bringing on to the record only defendant No. 20 who

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preferred a memorandum of objections. The appeal was dismissed for the reason that the mortgagee's representatives were not joined: *Held*, that the appeal had been heard within the meaning of Civ. Pro. Code, s. 561, and accordingly that the memorandum of objections should be heard. KOMBI ACHEN v. KOCHUNNI, 21 M. 352 ... 604

(62) *S. 562—Remand—Preliminary point.*—Where a District Munsif, without entering into the merits of a case, dismissed a suit on the ground that the plaintiffs had no cause of action, and on appeal the Appellate Court reversed his decree and remanded the case: *Held*, that the suit had been disposed of upon a preliminary point within the meaning of s. 562, Civ. Pro. Code, and that the remand was right. KANAKAMMAL v. RANGACHARIAR, 20 M. 25=6 M.L.J. 259 ... 18

(63) *S. 574—Contents of appellate judgment—Duty of Appellate Court to examine the correctness of a finding in the absence of a memorandum of objections.*—A Judge having remanded a case for further evidence to be taken and a fresh finding recorded on a question of fact, he is bound to examine the correctness of the finding, and to state in his judgment the reasons for which he either accepts or rejects it. KUNHI MARAKKAR HAJI v. KUTTI UMMA, 20 M. 496 ... 352

(64) S. 575—Appeal referred owing to a difference of opinion on a point of law—Religious Endowments Act—Act XX of 1863, ss. 3, 4, 7, 11, 14—Suspension and dismissal of trustee of a temple—Powers of temple committee—See ACT XX OF 1863 (RELIGIOUS ENDOWMENTS,) 21 M. 179.

(65) *S. 583—Limitation Act—Act* XV *of* 1877, *sch.* II, *art.* 179—*Application for restitution—Period of limitation—Fraud.*—Applications made to obtain restitution under a decree in accordance with Civ. Pro. Code, s. 583, are proceedings in execution of that decree and are governed by Limitation Act, sch. II, art. 179. VENKAYYA v. RAGAVACHARLU, 20 M. 448=8 M.L.J. 79 317

(66) *S. 588—Letters Patent, s.* 15.—A District Munsif having dismissed a suit on a preliminary point, the District Court on appeal made an order remanding it to him to be disposed of on the merits. Against this order an appeal was preferred to the High Court, which came on for disposal before a single Judge, who delivered judgment dismissing it: *Held*, that no appeal lay under Letters Patent, s. 15, against his judgment. VASUDEVA UPADYAYA v. VISVARAJA THIRTHASAMI, 20 M. 407 ... 289

(67) Ss. 617, 647—Village Courts' Act (Madras)—Act I of 1889, s 13, proviso 3—'Land' includes 'house'—See ACT, I OF 1889 (VILLAGE COURTS, MADRAS), 20 M. 21.

**Claim.**

See CRIM. PRO. CODE (ACT X OF 1882), 20 M. 88.

**Collusive Decree.**

(1) *Fraud on creditors—Sham sale-deed to defeat creditors—Suit to declare title of fraudulent transferor in possession.*—A executed a sale-deed of his land to B. An attachment placed on the land was raised at the instance of B as vendee. The attaching creditor sued impeaching the transfer as collusive; but finally consented to a decree upholding the title of B who then applied to be registered as owner in the place of A. A, who remained in possession throughout, resisted the application, and now sued B for a declaration that he was entitled to remain on the register as owner. It was alleged and proved that the apparent sale-deed was a sham, and had been executed for

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no consideration with intent to defraud the plaintiff's creditors, and that the plaintiff had paid the attaching-creditor to consent to the abovementioned decree to which both he and B were parties : *Held*, that the suit should be dismissed. YARAMATI KRISHNAYYA v. CHUNDRU PAPAYYA, 20. M. 326 ... 231

(2) *Fraudulent conveyance—Fraud on creditors—Fraudulent purpose carried out—Suit by legal representative of the fraudulent transfer and judgment-debtor to set aside conveyance and restrain execution of decree—Widow of Hindu transferor.*—A, with the intention of defeating and defrauding his creditors, made and delivered a promissory note to B without consideration and collusively allowed a decree to be obtained against him on the promissory note, and conveyed to B a house in part satisfaction of the decree: and it appeared that certain of A's creditors were consequently induced to remit parts of their claim. A having died, his widow and legal representative, under Hindu Law, now sued B to have the promissory note, and the conveyance set aside, and to have the defendant restrained by injunction from executing the decree: *Held*, (1) that the plaintiff was not entitled to relief, for A if now alive could not have claimed to have his own fraudulent acts set aside, and the plaintiff was in no better position than he would have been. *Quære*: Whether a widow might successfully maintain a claim for maintenance out of property alienated by her husband without consideration and fraudulently if she herself was no party to the fraud. RANGAMMAL v. VENKATACHARI, 20 M. 323=6 M.L.J. 64 ... 226

(3) *Suit to set aside decree.*—The plaintiff was a Hindu who, in order to prevent his undivided son from obtaining his share of the family property, made and delivered to the defendant certain promissory notes unsupported by consideration, the agreement between them being that the defendant should obtain a decree on the notes and in execution attach and bring to sale and himself purchase the lands of the family and should hold them at the disposal of the present plaintiff. The suit and the subsequent proceedings in Court were carried on by them collusively, the present plaintiff supplying the necessary funds. The son then sued for his share of the property, and having with the aid of his father (who had meanwhile lost his confidence in the defendant) successfully impeached the sale as collusive, obtained a decree which was executed. It had been agreed that the defendant should hold the land at the disposal of the plaintiff, but he now refused to surrender to him his share. The plaintiff accordingly sued to recover his share of the property and for a declaration that the collusive decree against him and the subsequent proceedings in execution thereof were not binding on him: *Held*, that it is not competent to a party to a collusive decree to seek to have it set aside, and that the plaintiff accordingly was not entitled to relief. VARADARAJULU NAIDU v. SRINIVASULU NAIDU, 20 M. 333. ... 236

**Companies Act (VI of 1882).**

*Unregistered association for gain—Illegal contract.*—The prize winners in a lottery in which more than twenty persons took tickets covenanted with the promoters of the lottery to continue their subscriptions in respect of the successful ticket for two more years in accordance with the arrangement under which the lottery was established. The money not having been paid the promoters brought a suit on the covenant: *Held*, that there was no association of twenty persons for the purpose of gain or at all, and consequently, that the plaintiffs were not precluded from suing for want of

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registration under Companies Act, s. 4. PANCHENA MANCHU NAYAR v. GADINHARE KUMARANCHATH PADMANABHAN NAYAR, 20 M. 68=7 M. L. J. 26 ... 48

**Compensation.**

(1) See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 21 M. 239.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 269.

(3) See CRIM. PRO. CODE (ACT X OF 1882), 21 M. 74, 21 M. 237.

(4) See LANDLORD AND TENANT, 21 M. 138.

**Composition Deed.**

See TRUSTEE, 20 M. 91.

**Compromise.**

(1) Enforceability of—Pensions Act—Act XXIII of 1871, s. 4—Suit relating to inam land granted before the time of the British Government—Confirmation of inam—Construction and enforceability of compromise of suit between members of grantee's family—Removal of manager—Appointment of receiver: See ACT XXIII OF 1871 (PENSIONS), 21 M. 310.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 91.

(3) See PLEADER AND CLIENT, 21 M. 274.

**Confession.**

*Confessional statements of Accused—Subsequent retractation—Crim.Pro.Code—Act* X *of* 1882, *s.* 103*—Search by Police of stolen property—Charge to Jury.*—It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. A Jury should be asked with reference to such confessions, not whether they were corroborated by independent evidence, but whether having regard to the circumstances under which they were made and retracted and all the circumstances connected with them, it was more probable that the original confessions or the statements retracting them were true. Crim. Pro. Code, s. 103, does not justify the view that the persons called upon to witness a search are to be selected by any person other than the officer conducting the search. If the Sessions Judge considers that the evidence of an Inspector of Police is necessary, he ought not to animadvert on his absence in charging the Jury; but he should intimate his opinion to the Public Prosecutor and give him the opportunity of calling that official. It is wrong for a Judge in charging the Jury to say that a Head Constable committed a breach of the Police regulations in conducting a search with a loose shirt on, without examining him on the matter and taking evidence as to whether or not his body was examined, before he began the search. QUEEN-EMPRESS v. RAMAN, 21 M. 83=2 Weir 46, 374 & 503 ... 415

**Consent Decree.**

See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 91.

**Construction.**

(1) *Title under a will followed by a family arrangement adding to the property devised.*—The will of a proprietor, who died in 1864, disposed of a zemindari, and of one village within it, as two distinct properties, giving the zemindari to the testator's two widows, and, on the other hand, giving the village in equal shares in perpetuity to the two brothers of his junior

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wife. Neither of the two brothers took possession of their respective moieties on the testator's death, and the whole village was treated for some time as part of the zemindari, the profits of it being received by, or on behalf of, the widows. In 1869, one of the brothers having died, leaving a son, who succeeded to his rights in the village, a family arrangement was made that the entirety of it should be made over to the surviving brother, the present claimant, the son of the other receiving from the widows satisfaction in lieu of his moiety. The junior widow having died, the senior got possession of the village, alleging that the surviving brother had merely been appointed to act as manager of it, on behalf of herself and her co-widow: *Held*, that under the will the claimant had been originally entitled to one-half of the village including its rents, from the testator's death; and that to this half had been added the other with title in 1869, in pursuance of the transaction in regard to it. An order, given by the widows in that year making over the village, was not a revocable one; and the interest in the additional half, conferred upon the claimant, was commensurate with what was already his own. No writing was then necessary to vest the other half in him. Such a transaction was good and valid as a family arrangement; and he had made out his title to the whole village. RAJA VELLANKI VENKATA RAMA RAU v. RAJA PAPAMMA RAU, 21 M. 299 (P.C.)=25 I.A. 84=7 Sar. P.C.J. 313 ... 567

(2) See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 21 M. 503.
(3) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 467.
(4) See HINDU LAW (IMPARTIBLE ESTATES), 20 M. 167.
(5) See HINDU LAW (WILL), 20 M. 293.
(6) See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 M. 253.

**Contract.**

(1) *Usage imported as term of a contract—Practice on a particular estate.*—In order that the practice on a particular estate may be imported as a term of the contract into a contract in respect of land in that estate, it must be shown that the practice was known to the person whom it is sought to bind by it, and that he assented to its being a term of the contract; and when the person sought to be bound by the practice is an assignee for value of rights under that contract, it must also be shown that he and all prior assignees (if any) for value knew that the practice was a term of the original contract. MANA VIKRAMA v. RAMA PATTER, 20 M. 274=7 M.L.J. 87. 195
(2) See CONTRACT ACT (IX OF 1872), 20 M. 481.
(3) See HINDU LAW (ALIENATION), 20 M. 354.
(4) See SPECIFIC PERFORMANCE, 20 M. 19.

**Contract Act (IX of 1872).**

(1) S. 23—*Unlawful agreement—Promissory note given in fraud of Insolvency law.*—In a suit on a promissory note it appeared that it had been given by the defendant to the plaintiff in consideration of his withdrawing his threatened opposition to the discharge of an insolvent and consenting to an arrangement among the general body of creditors, who were not though the insolvent was aware of this transaction whereby the plaintiff was to obtain a special advantage: *Held*, that the contract was unlawful and the suit could not be maintained. KRISHNAPPA CHETTI v. ADIMULA MUDALI, 20 M. 84 ... 59
(2) Ss. 38, 42, 43, 45—*Joint promisee—Discharge by one of two joint mortgagees.*—The sum due upon a mortgage was paid to one of the two mortgagees,

**Contract Act (IX of 1872)**—(*Concluded*). PAGE

and he gave an acquittance without the knowledge of the other mortgagee who now brought this suit upon the mortgage. It appeared that there was no fraud on the part of the mortgagors and that the mortgagee who received payment was not the agent of the plaintiff in that behalf: *Held*, that the mortgage had been discharged and the plaintiff was not entitled to sue. BARBER MARAN v. RAMANA GOUNDAN, 20 M. 461=7 M.L.J. 269 ... 327

(3) S. 43—*Joint promisors—Suit for money against person carrying on business of a dissolved partnership—Objection taken on ground of non-joinder.*—In a suit for money due on account of dealings in clothes from 1889 to 1895, it appeared that the dealings had taken place between the plaintiff and the firm consisting of the defendant and another till 1894 when the firm was dissolved, since which date the defendant had carried on the business and dealt with the plaintiff: *Held*, that the suit was not bad for non-joinder of the late partner. *Per Cur*: it is not incumbent on a person dealing with partners to make them all defendants in a suit. NARAYANA CHETTI v. LAKSHMANA CHETTI, 21 M. 256 ... 537

(4) S. 73—*Interest—Suit for money payable under an oral contract.*—The plaintiff sued to recover a sum of money due to her on an oral contract together with interest. No agreement or usage giving a right to interest was alleged, and no written demand notice had been given under the Interest Act: *Held*, that the plaintiff was not entitled to interest. KAMALAMMAL v. PEERU MEERA LEVVAI ROWTHEN, 20 M. 481=7 M. L. J. 263 ... 341

(5) S. 73—Railways Act—Act IX of 1890, s. 72—Condition under which goods despatched by Railway—Deterioration—Remoteness of damage—See ACT IX OF 1890 (RAILWAYS), 21 M. 172.

(6) S. 122—*Agency to sell, coupled with interest—Discretion as to price left with agent—Power of principal to impose limits as to price.*—The defendant consigned goods to a firm in London for sale, and in respect of each consignment he received an advance from the plaintiff who was the agent of the London firm, and signed a consignment note, which contained the following passage:—"I hereby authorize you to sell the above goods at "the best price obtainable without reference to me and I give you full "discretion and power to act on my behalf to the best of your judgment "in regard to such sale and in all matters connected with the management "of this consignment. Should there be any short-fall after realization of "the above consignment, I hereby authorize you to draw on me for the "amount, and I engage to honour such draft and to pay it on presen-"tation." The plaintiff guaranteed the payment of the redrafts to the London firm on whose account he made the advances to the defendant. Shortfalls having occurred on certain consignments and the London redrafts having been dishonoured, the plaintiff paid them, and now sued to recover the amount from the defendant. It appeared that consignments had been sold at prices less than certain limits which have been fixed by the defendant subsequent to the receipt of the advances and the signature of the consignment notes: *Held*, that the defendant had no right (regard being had to the terms of the consignment note and the course of dealing between the parties) so to impose limits of price, and that the plaintiff was entitled to recover. KONDAYYA CHETTI v. NARASIMHULU CHETTI, 20 M. 97 ... 68

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**Contribution.**

See LIMITATION ACT (XV OF 1877), 20 M. 23.

**Conveyance.**

See STAMP ACT (I OF 1879), 20 M. 27, 21 M. 422.

**Copies.**

(1) See CRIM. PRO. CODE (ACT X OF 1882), 20 M. 189.

(2) See LIMITATION ACT (XV OF 1877), 20 M. 476.

**Costs.**

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 45, 403, 421.

(2) See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 M. 32.

**Court-fee.**

(1) See BREACH OF TRUST, 20 M. 398.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 113.

**Court Fees Act (VII of 1870).**

(1) S. 5—Limitation Act—Act XV of 1877, S. 10—Suit between co-trustees—Breach of trust—Objection as to Court-fee paid on appeal. See BREACH OF TRUST, 20 M. 398.

(2) *Ss.* 5, 8, 28, *sch.* II, *art.* 17 *(IV)—Appeal against award under Land Acquisition Act.*—An appeal against an award made by the District Judge under Land Acquisition Act I of 1894 was filed in the High Court, the appeal memorandum bearing a Court-fee stamp of Rs. 10 only and was admitted by the Registrar, no question having been raised as to the sufficiency of the stamp. On the appeal having been posted for hearing, it was objected on the part of the respondent that the stamp paid was insufficient: *Held*, that the appeal memorandum should have borne an *ad valorem* stamp under Court Fees Act, s. 8, and that there having been no decision by the taxing officer under s. 5, it was open to the respondent to raise the objection on appeal at the hearing. KASTURI CHETTI v. DEPUTY COLLECTOR, BELLARY, 21 M. 269 ... 546

(3) Ss. 6, 28—Civ. Pro. Code—Act XIV of 1882, s. 54—Presentation of plaint improperly stamped—See LIMITATION ACT (XV OF 1877), 20 M. 319.

(4) S. 7, cl. IV (*b*)—See ACT VII OF 1877 (SUITS VALUATION), 20 M. 289.

(5) *Ss.* 7, 11—*Mesne profits left to be determined in execution of decree—Valuation of appeal against decree.*—In a suit for land with mesne profits a decree was passed for the plaintiff in which the amount of mesne profits was left to be determined in execution, the date from which they should be computed being the date of the suit. The defendant appealed against the decree on the ground that he should not have been decreed to pay either mesne profits or costs. In the valuation of the appeal for the purpose of the Court Fees Act, nothing was included on account of the mesne profits: *Held*, that no stamp duty was payable in respect of the mesne profits subsequent to the institution of the suit. MAIDAN v. JANAKIRAMAYYA, 21 M. 371 ... 619

**Cowle.**

See LIMITATION, 21 M. 169.

**Criminal Procedure.** PAGE

*Criminal trial in Sessions Court—Examination of some of the witnesses bound over—Stopping the trial.*—Certain presons were tried in a Sessions Court for the offence of dacoity. Seven witnesses had been examined for the prosecution by the committing Magistrate and were bound over to give evidence at the trial. After five witnesses have been examined, the Judge asked the jury whether they wished to hear any more evidence, and, on their stating that they did not believe the evidence and wished to stop the case, the Judge recorded a verdict of acquittal; *Held*, that the procedure adopted was wrong, and that no final opinion as to the falsehood or insufficiency of the prosecution evidence ought to have been arrived at until the two remaining witnesses had been examined. QUEEN-EMPRESS v. RAMALINGAM, 20 M. 445=2 Weir 384 ... 315

**Crim. Pro. Code (Act X of 1882).**

(1) S. 11—*Sentence imposed in British India postponed till expiry of a sentence imposed in Mysore.*—It is competent to a Magistrate in British India to pass a sentence which should take effect after the expiration of a sentence in Mysore. QUEEN-EMPRESS v. VENKATARAM JETTI, 20 M. 444=2 Weir 452 ... 314

(2) Ss. 16, 350—Bench of Magistrates—District Municipalities Act (Madras)—Act IV of 1884, ss. 263, 264—See ACT IV OF 1884 (DISTRICT MUNICIPALITIES, MADRAS), 21 M. 246.

(3) S. 83—Breach of Contract Act—Act XIII of 1859—Warrant—See ACT XIII OF 1859 (WORKMAN'S BREACH OF CONTRACT), 20 M. 457.

(4) S. 83—*Warrants issued under Act* XIII *of* 1859—*Execution outside jurisdiction.*—S. 83 of the Crim. Pro. Code applies to warrants issued under s. 1 of Act XIII of 1859. and consequently such warrants may be executed outside the local jurisdiction of the Magistrates issuing them. QUEEN-EMPRESS v. KATTAYAN, 20 M. 235=1 Weir 697=2 Weir 40 ... 167

(5) S. 88—*Attachment of property as of an absconding person—Claim to property attached—Procedure.*—When a claim is made to property attached under s. 88 of the Code of Criminal Procedure, the Magistrate should stay the sale to give the claimant time to establish his right. If the Magistrate errs, the remedy of the aggrieved party is by civil suit and not by criminal revision petition. QUEEN-EMPRESS v. KANDAPPA GOUNDAN, 20 M. 88=2 Weir 42 ... 62

(6) S. 103—Confessional statements of accused—Subsequent retractation—Search by Police of stolen property—Charge to Jury—See CONFESSION, 21 M. 83.

(7) Ss. 157, 168, 173 — *Occurrence reports — Charge sheets — Right of an accused to copies of, before trial — Public documents—Evidence Act, ss. 74, 76—Right to inspect and have copies.*—*Held*, by the Full Bench (*Subramania Ayyar, J., diss.*)—Reports made by a Police officer in compliance with ss. 157 and 168 of the Crim. Pro. Code are not public documents within the meaning of s. 74 of the Indian Evidence Act, and consequently an accused person is not entitled, before trial, to have copies of such reports: *Held*, by *Collins, C.J.*, and *Benson, J.*—The same rule applies to reports made by a Police officer in compliance with s. 173 of the Crim. Pro. Code: *Held*, by *Shephard* and *Subramania Ayyar, JJ.*—Reports made by a Police officer in compliance with s. 173 of the Crim. Pro. Code are public documents within the meaning of s. 74 of the Indian Evidence Act, and consequently

**Crim. Pro. Code (Act X of 1882)—(*Continued*).** PAGE

an accused person, being a person interested in such documents, is entitled by virtue of s. 76 of the Indian Evidence Act to have copies of such reports before trial. QUEEN-EMPRESS v. ARUMUGAM, 20 M.189 (F.B.)=7 M.L.J. 167=2 Weir 120, 142, 144 & 763 ... 132

(8) *S.* 195—*Sanction to prosecute—Power of Court to go outside record.*—A Magistrate in deciding whether to sanction under Crim. Pro. Code, s. 195, a prosecution for giving false evidence has power to hold an enquiry and record other evidence besides that in the case before him, in the course of which the offence is supposed to have been committed. QUEEN-EMPRESS v. MOTHA, 20 M. 339=7 M.L.J. 311=2 Weir 175 ... 240

(9) *Ss.* 195 (*b*), 423, 439, 476—*Whether a High Court in revision can revoke an order of a Subordinate Court under s.* 476, *Code of Criminal Procedure.*—A High Court, as a Court of Revision, has power, under s. 439, to revoke an order made by a Subordinate Court under s. 476 of the Code of Criminal Procedure. QUEEN-EMPRESS v. SRINIVASALU NAIDU, 21 M. 124 (F.B.) =2 Weir 593 ... 447

(10) *Ss.* 195, 433—*Abetment of an offence, Penal Code, s.* 109—*Sanction to prosecute unnecessary.*—Though sanction to prosecute is necessary in cases falling under the sections of the Penal Code set forth in s. 195, Crim. Pro. Code, no such sanction is required previous to the prosecution of a person charged with the abetment of such offences. QUEEN-EMPRESS v. ABDUL KADAR SHARIFF SAHEB, 20 M. 8 ... 6

(11) *S.* 202—*Reference of cases to the Police for enquiry.*—A Magistrate can send a case for enquiry by the Police under Crim. Pro. Code, s. 202, only when for reasons stated by him he distrusts the truth of the complaint. In cases where the accused is a member of the Police force, it is generally better that the enquiry should be prosecuted by a Magistrate. QUEEN-EMPRESS v. KANNAPPA PILLAI, 20 M. 387 =2 Weir 240 ... 275

(12) *S.* 203—*Duty of Magistrate to examine witnesses for the complainant.*—When a case has not been disposed of under Crim. Pro. Code, s. 203, and the complainant's witnesses have been summoned, the Magistrate is bound to examine the witnesses tendered by the complainant, and is not entitled to acquit the accused on a consideration of the complainant's statement alone. QUEEN-EMPRESS v. SINNAI GOUNDAN, 20 M. 388=2 Weir 251 ... 276

(13) *Ss.* 211, 217, 560.—A Magistrate, in acquitting persons accused on a charge of theft which he found to be false and malicious, awarded compensation to each of them to be paid by the complainant. Subsequently one of the accused applied for and obtained sanction to prosecute the complainant for bringing a false charge under Penal Code, s. 211, and certain of his witnesses for the offence of giving false evidence under s. 193: *Held*, that the order granting sanction was not illegal as regards the complainant by reason of the previous award of compensation. ADIKKAN v. ALAGAN, 21 M. 237=2 Weir 312 ... 523

(14) *S.* 419—*Presentation of appeal petition by the clerk of the appellants' pleader.*—Presentation of an appeal petition by the clerk of the appellants' pleader is equivalent to a presentation by the pleader himself when it is signed by him and he is duly authorized. QUEEN-EMPRESS v. KARUPPA UDAYAN, 20 M. 87=2 Weir 470 ... 61

**Crim. Pro. Code (Act X of 1882)—(*Concluded*).** PAGE

(15) *S.* 419 —*Presentation of criminal appeal.*—A petition of appeal under the Crim. Pro. Code is not duly presented when having been signed by a pleader, it is handed in by a person who is not his clerk and over whose conduct and actions he has no control. QUEEN-EMPRESS v. RAMASAMI, 21 M. 114=2 Weir 470 ... 437

(16) *S.* 487—*Judicial proceedings.*—A Magistrate, who has refused to set aside an order sanctioning a prosecution on the charge of perjury, has no jurisdiction under Crim. Pro. Code, s. 487, to try the case himself. QUEEN-EMPRESS v. SESHADRI AYYANGAR, 20 M. 383=2 Weir 613 ... 272

(17) *S.* 488—*Maintenance—Adultery.*—Adultery on the part of the husband, not being such adultery as would be punishable under Indian Penal Code, may nevertheless constitute sufficient cause for the wife separating from her husband and enable her to claim maintenance under Crim. Pro. Code, s. 488. GANTAPALLI APPALAMMA v. GANTAPALLI YELLAYYA, 20 M. 470 (F.B.)=2 Weir 643=7 M.L.J. 303 ... 333

(18) *S.* 488—*Maintenance—Sentence of imprisonment on default.*—The imprisonment provided by s. 488, Crim. Pro. Code, in default of payment of maintenance awarded is not limited to one month. The maximum imprisonment that can be imposed is one month for each month's arrear, and if there is a balance representing the arrears for a portion of a month, a further term of a month's imprisonment may be imposed for such arrear. ALLAPICHAI RAVUTHAR v. MOHIDIN BIBI, 20 M. 3=2 Weir 638 ... 3

(19) *S.* 545—*Death caused by negligence—Compensation to widow.*—A Magistrate imposed a fine in addition to a sentence of imprisonment on a conviction for the offence of causing death by a rash and negligent act and gave compensation to the widow of the deceased out of the fine imposed: *Held*, that compensation could not be given to the widow under Crim. Pro. Code, s. 545. YALLA GANGULU v. MAMIDI DALI, 21 M. 74 (F.B.) =2 Weir 719 ... 408

**Criminal Proceedings.**

See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), 20 M. 365.

**Custom.**

See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 21 M. 136.

**Customary Right.**

See EASEMENTS ACT (V OF 1882), 20 M. 389.

**Damages.**

(1) See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 21 M. 245.
(2) See ACT IX OF 1890 (RAILWAYS), 21 M. 172.
(3) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 369.
(4) See KARNAM, 20 M. 145.
(5) See LIMITATION ACT (XV OF 1877), 21 M. 8.

**Datta Homam.**

See HINDU LAW (ADOPTION), 21 M. 497.

**Decree.**

(1) *Explained by reference to the judgment—Title of nearest reversioner.*—In a prior suit a decree of the High Court awarded to the plaintiff the substantial relief claimed by him as reversionary heir entitled to inherit after the

**Decree**—(*Concluded*). PAGE

mother of the last male owner, then deceased, she holding her limited estate in the property; and the decree declared that certain alienations made by her were invalid against the reversionary heir. In the present suit the same plaintiff, as nearest reversioner, claimed possession of the property from the daughter of the mother, the latter having died since the prior suit; the daughter alleging title through her: *Held*, that the judgment, in the prior suit, was admissible, and ought to be examined in the present suit, in order to see what that suit decided as to the reversioner's title. The judgment showed that the question whether the plaintiff was the nearest reversioner having been raised in the prior suit, had been finally determined in the affirmative; and this was sufficient proof of his title in the present suit. SRI RAJA RAU LAKSHMI KANTAIYAMMI v. SRI RAJA INUGANTI RAJAGOPAL RAU, 21 M. 344 (P. C.)=2 C. W. N. 337=25 I. A. 102=7 Sar P. C. J. 325 ... 599

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 388.

(3) See TRANSFER, 20 M. 157.

(4) See TRANSFER OF PROPERTY ACT (IV OF 1882), 20 M. 78, 21 M. 253.

**Deposition.**

See LIMITATION ACT (XV OF 1877), 20 M. 239.

**Devadasi.**

See HINDU LAW (ADOPTION), 21 M. 229.

**Devasthanam Committee.**

(1) See BREACH OF TRUST, 20 M. 398.

**Dispossession.**

See LIMITATION ACT (XV OF 1877), 20 M. 118.

**Distraint.**

See ACT V OF 1884 (LOCAL BOARDS, MADRAS), 21 M. 296.

**Drain.**

See ACT IV OF 1884 (DISTRICT MUNICIPALITIES, MADRAS), 21 M. 4.

**Easement.**

See EASEMENTS ACT (V OF 1882), 20 M. 389.

**Easements Act (V of 1882).**

S. 2 (*b*)—*Easement over a well—Customary right to use the well.*—No fixed period of enjoyment is laid down by law as necessary to establish a customary right, and a customary right to use a well may exist apart from a dominant heritage. PALANIANDI TEVAN v. PUTHIRANGONDA NADAN, 20 M. 389 ... 277

**Ejectment.**

(1) *Suit—Title to relief completed pending a suit—Amendment of plaint.*—A having leased land to B, sold it to C. Persons having trespassed, B offered no objection, and it was alleged that he was in collusion with them. C now sued before the expiry of the lease to eject the trespassers; the lease expired while the suit was still pending: *Held*, that the plaintiff was not entitled to the relief sought and could not be permitted, on appeal, to amend the plaint by adding a prayer for declaration of his reversionary right, although the acts of the defendants were such as to be prejudicial to his rights as reversioner. RAMANADAN CHETTI v. PULIKUTTI SERVAI, 21 M. 288=8 M.L.J. 121 ... 559

**Ejectment**—(*Concluded*). PAGE

(2) See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 21 M 482.

(3) See ACT I OF 1887 (MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS, MADRAS), 20 M. 435.

(4) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 82, 375, 21 M. 18, 35.

(5) See LIMITATION, 21 M. 169.

(6) See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 M. 291.

**Emolument.**

See INAM, 20 M. 454.

**Encroachment.**

(1) See ACT IV OF 1884 (DISTRICT MUNICIPALITIES, MADRAS), 21 M. 246.

(2) See PENAL CODE (ACT XLV OF 1860), 20 M. 433.

**Enfranchisement.**

See INAM, 20 M. 454.

**English Insurance Company.**

See ACT IV OF 1884 (DISTRICT MUNICIPALITIES, MADRAS), 21 M. 5.

**Enhancement.**

See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 21 M. 136.

**Equity of Redemption.**

See MORTGAGE (REDEMPTION), 21 M. 110.

**Evidence.**

(1) See REGISTRATION ACT (III OF 1877), 20 M. 367, 484.

(2) See VENDOR AND PURCHASER, 21 M. 56.

**Evidence Act (I of 1872).**

(1) Ss. 74, 76—Occurrence reports—Charge sheets—Right of an accused to copies of, before trial—Crim. Pro. Code, ss. 157, 168, 173—Public documents—Right to inspect and have copies—See CRIM. PRO. CODE (ACT X OF 1882), 20 M. 189.

(2) S. 85—*Power of attorney—Declaration before notary public in proof of power of attorney.*—On an application for letters of administration with the will annexed, made by the attorney of the executors therein named, it appeared that the applicant's power of attorney was not executed in the presence of a notary public; but, with regard to the execution by each of the executors, one of the attesting witnesses had made a declaration before a notary public to the effect that he witnessed the execution of the power of attorney by one of the executors, and that the signature of the other attesting witness was the proper signature of the person bearing that name, and each declaration was signed, sealed and certified by a notary public: *Held*, that the power of attorney was sufficiently proved. *In re* SLADEN, 21 M. 492 ... 704

**Exchange.**

See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 M. 69.

**Execution of Decree.**

(1) *Receiver—Moneys collected by receiver in execution of decree misappropriated by him—Discharge of judgment-debtor.*—In execution of a decree a receiver was appointed to collect certain rents due to the judgment-debtor.

**Execution of Decree**—(*Concluded*). PAGE

Some of the judgment-debtor's tenants paid the rents due by them into the hands of the receiver, but the receiver did not pay the money into Court: *Held, per Shephard, J.*, that the payment by the tenants to the receiver did not *pro tanto* discharge the judgment-debtor from liability under the decree: *Held, per Davies, J.*, that payment by the tenants to the receiver *pro tanto* discharged the judgment-debtor from liability under the decree. MUTHIA CHETTI v. ORR, 20 M. 224 ... 160

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 10, 362, 366, 448; 21 M. 29, 51, 356, 409, 417.

(3) See COURT FEES ACT (VII OF 1870), 21 M. 371.

(4) See LIMITATION ACT (XV OF 1877), 20 M. 23; 21 M. 494, 257, 261.

**Executor.**

See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 467.

**Ex-parte Decree.**

See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 324.

**False Charge.**

See PENAL CODE (ACT XLV OF 1860), 20 M. 79.

**Foreign Court.**

See FOREIGN JUDGMENT, 20 M. 112.

**Foreign Judgment.**

*Suit on a foreign judgment—Jurisdiction of foreign Court—Residence of defendant—Constructive residence.*—The plaintiff having obtained against defendant a judgment in the District Court of Kandy now sued in British India to enforce it. It appeared that the defendant was domiciled and ordinarily resident in British India and that he had not appeared to defend the suit at Kandy and was not at the date of that suit or subsequently even temporarily resident in Ceylon; but he was a partner in a firm which carried out business at Kandy, and he was interested in lands at that place which he had visited once or twice: *Held*, that the Court at Kandy had no jurisdiction over the defendant. NALLAKARUPPA SETTIAR v. MAHOMED IBURAM SAHEB, 20 M. 112=7 M.L.J. 76 ... 79

**Forest Settlement Officer.**

See ACT V OF 1882 (FOREST, MADRAS), 20 M. 279.

**Forma Pauperis.**

See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 113.

**Fort Pagodas.**

At Tanjore—See HINDU LAW (RELIGIOUS ENDOWMENTS), 20 M. 421.

**Fraud.**

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 10, 448; 21 M. 91, 356.

(2) See COLLUSIVE DECREE, 20 M. 323, 326.

(3) See CONTRACT ACT (IX OF 1872), 20 M. 84.

(4) See SPECIFIC PERFORMANCE, 20 M. 19.

(5) See TRANSFER OF PROPERTY ACT (IV OF 1882), 20 M. 465.

**Fraudulent Conveyance.** PAGE

(1) Collusive decree—Fraud on creditors—Fraudulent purpose carried out—Suit by legal representative of the fraudulent transferor and judgment-debtor to set aside conveyance and restrain execution of decree—Widow of Hindu transferor. See COLLUSIVE DECREE, 20 M. 323.

(2) Fraud on creditors—Sham sale-deed to defeat creditors—Collusive decree—Suit to declare title of fraudulent transferor in possession. See COLLUSIVE DECREE, 20 M. 326.

**Full Bench.**

See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), 21 M. 232.

**Gazetted Holiday.**

See LIMITATION ACT (XV OF 1877), 20 M. 469.

**Government Stores.**

See ACT V OF 1884 (LOCAL BOARD, MADRAS), 20 M. 16.

**Guardian.**

(1) See ACT VIII OF 1890 (GUARDIANS AND WARDS), 21 M. 401.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 91, 167.

(3) See LUNATIC, 21 M. 402.

(4) See PROMISSORY NOTE, 21 M. 391.

**Hereditary Office.**

(1) See INAM, 20 M. 454, 21 M. 47.

(2) See REGULATION VI OF 1831 (HEREDITARY OFFICES, MADRAS), 21 M. 134.

**Hereditary Right.**

See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 360.

**High Court Rules.**

See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 490.

**Hindu Law.**

1.—ADOPTION.
2.—ALIENATION.
3.—DEBTS.
4.—GIFT.
5.—IMPARTIBLE ESTATES.
6.—INHERITANCE.
7.—JOINT FAMILY.
8.—MAINTENANCE.
9.—MARRIAGE.
10.—PARTITION.
11.—RELIGIOUS ENDOWMENTS.
12.—REVERSIONERS.
13.—SELF-ACQUISITION.
14.—STRIDHANAM.
15.—SUCCESSION.
16.—WIDOW.
17.—WILL.

———— **1.—Adoption.**

(1) Agreement on adoption—Charitable endowments—Civ. Pro. Code—Act XIV of 1882, s. 30—Interest sufficient to support a suit relating to charity—See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 10.

**Hindu Law—1.—Adoption—**(*Concluded*). PAGE

(2) *Devadasi—Adoption—Illegal purpose.*—The plaintiff sued as the adopted daughter of a deceased dancing woman to recover a share of the property left by her. It appeared that the adoption of the plaintiff, which took place in 1871, when she was six years old, was made with the intention of bringing her up to practise prostitution even during her minority: *Held*, that the adoption was invalid. SANJIVI v. JALAJAKSHI, 21 M. 229 ... 517

(3) *Giving and taking—Datta homam.*—A Brahman took a boy in adoption, but died before the ceremony of datta homam was performed. This ceremony was performed after the death of the adoptive father by his widow: *Held* that the adoption was valid. SUBBARAYAR v. SUBBAMMAL, 21 M. 497. 708

(4) See HINDU LAW (PARTITION), 21 M. 226.

———2.—**Alienation.**

(1) *Conditional contract to sell family lands—Birth of vendor's son before fulfilment of condition.*—A Hindu entered into a contract to sell certain land, being family property, of which he was not in possession as soon as possession should be obtained. Before possession was obtained a son was born to him. A decree for specific performance was passed and executed against him, the son not being brought on to the record. In a suit by the son for partition of the property in question: *Held*, that the plaintiff had an existing right in the property which was not bound by the decree and the subsequent proceedings, and that he was entitled to the relief sought. *Semble*: that a contract for sale of land made by a Hindu before a son is born to him is not binding on the son born before the transfer of the property takes place. PONNAMBALA PILLAI v. SUNDARAPPAYYAR, 20 M. 354=7 M.L.J. 240 ... 251

(2) *Mortgage—Loan at time of mortgage—Whether mortgage binding on the share of the mortgagor's undivided son.*—In order to justify a sale or a mortgage by a father so as to bind his son's share of the property, there must be in fact an antecedent debt, *i e.*, a debt prior to the mortgage or sale. SAMI AYYANGAR v. PONNAMMAL, 21 M. 28 ... 376

(3) Po-Brahman—Alienation by widow for religious purposes—'Res judicata'—Decision on title in proceedings under Land Acquisition Act, 1870. See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 269.

(4) See HINDU LAW (WIDOW), 21 M. 128.

(5) See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 M. 222.

———3.—**Debts.**

(1) See HINDU LAW (ALIENATION), 21 M. 28.

———4.—**Gift.**

(1) See HINDU LAW (WILL), 20 M. 293.

(2) See STAMP ACT (I OF 1879), 21 M. 422.

(3) See TRANSFER OF PROPERTY ACT (IV OF 1882), 20 M. 147.

———5.—**Impartible Estates.**

(1) *Impartibility not established—Possession of one member of joint family at a time—What constitutes partition.*—A zemindari granted by the Government in 1803 to a Hindu, descended in his family, possession being held by one member at a time. The estate, however, was not impartible. But whether it was, or was not, impartible was adjudged immaterial to the question raised on this appeal. The last zemindar having died without issue in 1888, his widow was in possession when this suit was brought

**Hindu Law—5.—Impartible Estates—**(*Concluded*). PAGE

by a male collateral descended from a great grandfather common to him and to the last zemindar. The plaintiff claimed to establish his right as member of an undivided family holding joint property against the widow who alleged that her husband had been sole proprietor. In proof of this she relied on certain arrangements as having constituted partition, *viz*., that in 1816, two brothers, then heirs, agreed that the elder should hold possession, and that the younger should accept a village, appropriated to him for maintenance in satisfaction of his claim to inherit; again, that in 1866, the fourth zamindar compromised a suit brought against him by his sister for her inheritance, on payment of a stipend to her, having already, on the claim of his brother, granted to him two villages of the estate; and, by the compromise, this was made conditional on the sister's claim being settled; again, that in 1871, the fourth zemindar having died pending a suit brought against him to establish the fact of an adoption by him, an arrangement was made for the maintenance of his daughter, and two widows, who survived him, the previous grant for maintenance of his brother holding good, the adoption being admitted, and the suit compromised: *Held*, that there was nothing in the above which was inconsistent with the zemindari remaining part of the common family property; and that the course of the inheritance had not been altered: *Held*, also, that the claimant was not precluded by the family compromise of 1871, or in any way, from maintaining this suit; and that it was not barred by limitation. SRI RAJA VIRAVARA THODHRAMAL RAJYA LAKSHMI DEVI v. SRI RAJA VIRAVARA THODHRAMAL SURYA NARAYANA DHATRAZU, 20 M. 256 (P.C.) = 24 I.A. 118 = 7 Sar P.C.J. 185 ... 182

(2) *Power of testamentary disposition—Will, construction of—Misdescription of legatee.*—The holder of an impartible estate may alienate it by will to the same extent that he may alienate it by gift *inter vivos*. A testator made a bequest to "A B my avurasa son," knowing that A B was not his avurasa son: *Held*, that the misdescription was immaterial and that A B took the bequest. THE COURT OF WARDS v. VENKATA SURYA MAHIPATI RAMAKRISHNA RAU, 20 M. 167 = 6 M.L.J. 218 ... 118

**——6.—Inheritance.**

(1) *Obstructed inheritance—Inheritance passing to daughter's son—Survivorship—Presumption of joint property.*—The daughter's sons of a deceased Hindu take the property of their maternal grandfather as an inheritance liable to obstruction and consequently take it without rights of survivorship *inter se*: Where property enjoyed in common by persons capable of forming a joint Hindu family was in its origin separate property, there is no presumption that such property has subsequently become joint property. SRI RAJA CHELIKANI VENKATARAMANAYAMMA GARU v. APPA RAU BAHADUR GARU, 20 M. 207 = 7 M.L.J. 143 ... 145

(2) See HINDU LAW (IMPARTIBLE ESTATES), 20 M. 256.

(3) See HINDU LAW (SUCCESSION), 21 M. 100.

**——7.—Joint Family.**

(1) *Suit by a purchaser from a coparcener—Decree for share of coparcener in specific property.*—In a suit to recover possession of property purchased by the plaintiff, if it is found that the property is not the separate property of the plaintiff's vendor, but belongs to the joint family of which plaintiff's vendor is a member, the plaintiff is not entitled to a decree from his vendor's share in that property and the suit must be dismissed. PALANI KONAN v. MASAKONAN, 20 M. 243 ... 173

**Hindu Law—7.—Joint family—(*Concluded*).** PAGE

(2) See ACT VII OF 1887 (SUITS VALUATION), 20 M. 289.

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 349, 21 M. 167.

(4) See COLLUSIVE DECREE, 20 M. 333.

(5) See HINDU LAW (ALIENATION), 20 M. 354.

(6) See HINDU LAW (IMPARTIBLE ESTATES), 20 M. 256.

(7) See HINDU LAW (INHERITANCE), 20 M. 207.

(8) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 20 M. 232.

———**8.—Maintenance.**

(1) See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 20 M. 29.

(2) See CRIM. PRO. CODE (ACT X OF 1882), 20 M. 470.

(3) See STAMP ACT (I OF 1879), 21 M. 422.

———**9.—Marriage.**

*Prohibited degrees.*—A marriage between a Hindu and the daughter of his wife's sister is valid. RAGAVENDRA RAU v. JAYARAM RAU, 20 M. 283=7 M. L.J. 134 ... 201

———**10.—Partition.**

(1) Arbitration—Suit to enforce the award with an alternative claim for partition—Whether such suit maintainable—See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 490.

(2) *Illatom son-in-law—Right to partition.*—The question whether an illatom son-in-law can demand partition from his father-in-law is not a pure question of law, but one that depends upon custom and can only be determined upon evidence. CHINNA OBAYYA v. SURA REDDI, 21 M. 226. 515

(3) *Of land between widow and mother of the last male owner—Widow's right on death of mother.*—The widow and mother of a land-owner who died without issue, divided his land between them in 1869. The mother sold her share of the land in 1870, and died in 1890. The widow now sued in 1893 to recover the property from the vendee: *Held*, that the suit was not barred by limitation and the plaintiff was entitled to recover. PARVATHI AMMAL v. SUNDARA MUDALI, 20 M. 459 ... 325

(4) *Subsequent acquisitions—After-born son—Right to partition.*—A Hindu having two sons divided his property between them, reserving no share for himself. A third son was subsequently born who now sued for a partition of the property which had been divided and other property subsequently acquired by his brothers by means of its proceeds: *Held*, that the plaintiff was entitled to the relief claimed. CHENGAMA NAYUDU v. MUNISAMI NAYUDU, 20 M. 75 ... 52

(5) See ACT VII OF 1887 (SUITS VALUATION), 20 M. 289.

(6) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 349, 369; 21 M. 234.

(7) See HINDU LAW (ALIENATION), 20 M. 354.

(8) See HINDU LAW (IMPARTIBLE ESTATES), 20 M. 256.

———**11.—Religious Endowments.**

(1) *Fort Pagodas at Tanjore—Right of management on death of the senior widow of the late Maharajah of Tanjore.*—After the death in 1855 of the late Maharajah of Tanjore without male issue, Government assumed charge of the Fort Pagodas, of which he was the hereditary trustee. Subsequently his senior widow, Her Highness Kamakshi Bayi Saheba applied that they should

**Hindu Law—11.—Religious Endowments—(*Concluded*).** PAGE

be handed over to her as the head of the family for the time being; and Government in 1863 made an order saying "it is desirable that the con-"nection of Government with the pagodas should cease; they will accord-"ingly be handed over to Her Highness Kamakshi Bayi Saheba." The pagodas and their endowments were handed over in pursuance of that order and were held by the senior widow till her death in 1892. On her death Government ordered that they should be placed under the Devastanam Committees of the circles in which they were situated. The senior surviving widow now claimed to be entitled to possession and the right of management by succession and sued accordingly: *Held*, that Government intended to make an absolute transfer in 1863 without any reservation of a reversionary right to make a new appointment, and that whether Her Highness Kamakshi Bayi Saheba took the trust property for a widow's estate or as stridhanam, the plaintiff was entitled to succeed. KALIANASUNDARAM AYYAR v. UMAMBA BAYI SAHEB, 20 M. 421 = 7 M.L.J. 324 ... 299

(2) See LIMITATION ACT (XV OF 1877), 21 M. 278.

———**12.—Reversioners.**

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 269.

(2) See DECREE, 21 M. 344.

(3) See HINDU LAW (SUCCESSION), 20 M. 342, 493.

(4) See HINDU LAW (WIDOW), 21 M. 128.

(5) See INAM, 21 M. 47.

———**13.—Self Acquisition.**

See HINDU LAW (PARTITION), 20 M. 75.

———**14.—Stridhanam.**

See HINDU LAW (SUCCESSION), 21 M. 58, 100, 263.

———**15.—Succession.**

(1) *Illegitimate children—Property of mother.*—A Hindu woman having daughters by one paramour and a son by another died leaving a house. The daughters sued for possession of the house in succession to their mother. It was *inter alia*, pleaded for the defence that the plaintiffs could not recover the house for the reason that it had been derived from the putative father of the first defendant, but this was not proved: *Held*, that the plaintiffs were entitled to recover. *Semble*: that the decision would have been the same even if the allegation on which the above plea was based had been established. ARUNAGIRI MUDALI v. RANGANAYAKI AMMAL, 21 M. 40 ... 384

(2) *Law of succession—Limitation Act—Act* XV *of* 1877, *sch. II, art.* 141—*Suit by reversioner on the death of female heir—Adverse possession.*—A Hindu died in 1880, leaving him surviving (1) a daughter who died in 1886, who was the grandmother of one of the plaintiffs, and (2) the son of a pre-deceased daughter who was another plaintiff, and (3) the widow of a pre-deceased son who was the defendant. The plaintiffs now sued in 1893 to recover possession of his land, of which the defendant had been in possession since his death: *Held*, that the suit was not barred by limitation and that the plaintiffs were entitled to a decree. VENKATARAMAYYA v. VENKATALAKSHMAMMA, 20 M. 493 = 7 M.L.J. 204 ... 349

**Hindu Law—15.—Succession—(*Concluded*).** PAGE

(3) *Law of succession—Stridhanam—Enfranchisement of service inam.*—Land which formed the emolument of the office of moniegar was enfranchised in favour of a Hindu woman, who died leaving her surviving defendant No. 2 (her husband), the plaintiff (her unmarried daughter), and two sons and two married daughters who were not parties to this suit. The plaintiff sued to recover the land to which she claimed to be entitled under the Hindu Law of inheritance: *Held*, that the property belonged to the deceased as her stridhanam descendible to her heirs, and (without deciding what control if any, defendant No. 2 had over the property) that the plaintiff was entitled to succeed according to the law of inheritance applicable to such property. SALEMMA v. LUTCHMANA REDDI, 21 M. 100=8 M.L.J. 14... 427

(4) *Law of succession—Stridhanam—Husband's nieces—Bandhu.*—A Hindu widow, married according to one of the approved forms, died without issue leaving her surviving the plaintiffs who were the daughters of her husband's deceased brother, and the first defendant who was the adopted son of her sister's daughter, and the second defendant who was the adopted son of her maternal uncle, and the third defendant who was the widow of her brother. The defendants having taken possession of her stridhanam property on her death, the plaintiffs now sued as heirs under the Hindu Law for possession: *Held*, that the plaintiffs were entitled to succeed. VENKATASUBRAMANIAM CHETTI v. THAYARAMMAH, 21 M. 263 ... 542

(5) *Law of succession—Stridhanam—Right of daughter to succeed.*—In a suit for land it appeared that it had been given to one Sellayi, deceased, after her marriage by her father. The donee died leaving her brother, defendant No. 1, her son (since deceased), the husband of defendant No. 2, and the plaintiff her daughter. Defendant No. 1 was in joint possession on behalf of defendant No. 2: *Held*, that the plaintiff was entitled to the land. MUTHAPPUDAYAN v. AMMANI AMMAL, 21 M. 58=8 M.L.J. 9 ... 397

(6) *Reversionary rights—Sister's grandson—Maternal uncle's son.*—The plaintiff sued as the nearest reversionary heir of one Vasudeva deceased to obtain a declaration that certain alienations made the widow (who was defendant No. 1) in favour of defendant No. 2 was not binding on the reversion. Defendant No. 3 was the son of Vasudava's sister's son, and was joined in the suit because he claimed to be a nearer heir than the plaintiff who was the son of Vasudeva's maternal uncle: *Held*, that both the plaintiff and defendant No. 3 were athma bandhus of the deceased, but defendant No. 3 was the nearer reversionary heir. BALUSAMI PANDITHAR v. NARAYANA RAU, 20 M. 342=7 M.L.J. 207 ... 243

———— **16.—Widow.**

(1) Service—Inams—Enfranchisement of the inam in favour of a widow—See INAM, 21 M. 47.

(2) *Transfer by Hindu widow of part of her estate—Consent of reversioner.*—A Hindu widow with the consent of A, the then nearest reversioner, sold part of the property inherited by her from her husband. A predeceased the widow and on her death B, C and D were the nearest reversioners, and they now sued to recover the property. It appeared that the sale was not justified by circumstances of legal necessity and that D had been born after the sale had taken place;—*Held*, that the sale was not binding on the plaintiffs or any of them. MARUDAMUTHU NADAN v. SRINIVASA PILLAI, 21 M. 128 (F.B.)=8 M.L.J. 69 ... 447

**Hindu Law—16.—Widow—**(*Concluded*). PAGE

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 269.

(4) See COLLUSIVE DECREE, 20 M. 323.

(5) See HINDU LAW (RELIGIOUS ENDOWMENTS), 20 M. 421.

(6) See LIMITATION ACT (XV OF 1877), 20 M. 470.

**———17.—Will.**

(1) *Bequest to daughters—Construction of will.*—A Hindu testator died leaving three daughters. By his will he gave certain property in equal shares to his younger daughters and their descendants and disposed of the rest for the benefit of his elder daughter S and her son R as follows: "All the "remaining rent should be collected by S and her son R; they shall, when "necessary, let the land to other tenants and have it cultivated, and R "shall pay the assessment and subject to the directions of his mother "shall enjoy the land and shall not in any way alienate the property." R predeceased S: *Held*, that the testator's daughter took a life estate with remainder to her son, and that on her death the property passed to the heirs of the son. SIVA RAU *v.* VITLA BHATTA, 21 M. 425 ... 658

(2) *By a Hindu—Construction of—Gift to daughter—Daughters estate.*—A Hindu by will bequeathed to his daughters his separate property to be enjoyed by them 'as they pleased': *Held*, that the daughters took an absolute estate. KAMARAZU *v.* VENKATARATNAM, 20 M. 293 ... 208

(3) Construction of—Appointment of executors by implication—Civ. Pro. Code, ss. 27, 53—Amendment of plaint by bringing on a new plaintiff on second appeal—See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 467.

(4) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 467.

(5) See CONSTRUCTION, 21 M. 299.

(6) See HINDU LAW (IMPARTIBLE ESTATES), 20 M. 167.

**House-tax.**

(1) See ACT IV OF 1884 (DISTRICT MUNICIPALITIES, MADRAS), 21 M. 367.

(2) See ACT V OF 1884 (LOCAL BOARDS, MADRAS), 21 M. 296.

**Inam,**

(1) *Enfranchisement of inam land—Inam attached to the hereditary office of nattamgar—Enfranchisement of inam lands in favour of two persons—Suit by the holder of the office to recover land.*—Inam lands constituting the emolument of the office of nattamgar was enfranchised in favour of the plaintiff and defendant separately. In November 1890 the defendant was informed that a patta for half of the lands would be issued in his name, and it was so issued in the following May. In April 1891 (after the resolution to enfranchise the land was come to) the plaintiff was appointed to be the sole nattamgar and he now sued in 1894 for the cancellation of the enfranchisement patta issued to the defendant, and for the issue of a patta in his own name in respect of the lands comprised therein and for possession of the lands: *Held*, that the plaintiff was not entitled to the relief sought. SANKARA SUBBAYYAR *v.* RAMASAMI AYYANGAR, 20 M. 454 ... 321

(2) *Enfranchisement of the inam in favour of a widow.*—Lands constituting the emoluments of the office of karnam were enfranchised in favour of a widow who had been in possession since the death of her husband which took place about 18 years previously. They were subsequently sold by her:

**Inam**—(*Concluded*). PAGE

*Held*, that the vendee's title was good against the reversionary heir of the husband. DHARANIPRAGADA DURGAMMA v. KADAMBARI VIRRAZU, 21 M. 47=7 M.L.J. 233 ... 389

(3) See ACT XXIII OF 1871 (PENSIONS), 21 M. 310.

(4) See HINDU LAW (SUCCESSION), 21 M. 100.

(5) See LIMITATION, 20 M. 6.

(6) See REGULATION VI OF 1831 (HEREDITARY OFFICES REGULATION, MADRAS), 21 M. 134.

**Injunction.**

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 353.

(2) See REGISTRATION ACT (III OF 1877), 20 M. 58.

**Insolvency.**

*Insolvent—Vesting order—Subsequent attachment — Dismissal of insolvency petition—Creditors' trustees.*—A judgment-debtor was declared an insolvent by the Court for the Relief of Insolvent Debtors, Madras, and a vesting order was made. Part of his property was subsequently attached in execution of a decree. Afterwards, his petition in insolvency was dismissed and the vesting order discharged. On the same date a creditor's trust deed was executed, of which the plaintiffs were the trustees. They now sued to set aside the proceedings in execution and to cancel the sale of the property which had been sold in execution after the date of the trust deed : *Held*, that the suit was not maintainable. RAMASAMI KOTTADIAR v. MURUGESA MUDALI, 20 M. 452=7 M.L.J. 229 ... 320

**Insolvency Law.**

See CONTRACT ACT (IX OF 1872), 20 M. 84.

**Interest.**

(1) '*Post diem*'—*Mortgage—Limitation.*—A mortgagee is entitled to interest *post diem*, if there is nothing in the document to indicate that the parties did not intend that interest should be paid after the due date. NITYANANDA PATNAYUDU v. SRI RADHA CHERANA DEO, 20 M. 371 ... 264

(2) Suit for money payable under an oral contract. See CONTRACT ACT (IX OF 1872), 20 M. 481.

(3) See MORTGAGE (GENERAL), 20 M. 149.

(4) See MORTGAGE (SALE), 20 M. 120.

(5) See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 M. 364.

**Inter-Pleader.**

See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 20 M. 155.

**Jenmi.**

See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 M. 291.

**Jodi.**

See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 21 M. 243.

**Joinder.**

See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 375.

**Joint Promisee.**

See CONTRACT ACT (IX OF 1872), 20 M. 461.

**Joint Promisors.** PAGE

See CONTRACT ACT (IX OF 1872), 20 M. 461, 21 M. 256.

**Judicial Proceeding.**

See CRIM. PRO. CODE (ACT X OF 1882), 20 M. 383.

**Jurisdiction.**

(1) See ACT XIII OF 1859 (WORKMAN'S BREACH OF CONTRACT), 20 M. 457.

(2) See ACT V OF 1882 (FOREST, MADRAS), 20 M. 279.

(3) See ACT VII OF 1887 (SUITS VALUATION), 20 M. 289.

(4) See ACT I OF 1889 (VILLAGE COURTS, MADRAS), 21 M. 363.

(5) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 89, 21 M. 398.

(6) See FOREIGN JUDGMENT, 20 M. 112.

(7) See SUITS VALUATION, 21 M. 271.

**Jury.**

See CONFESSION, 21 M. 83.

**Kandy.**

See FOREIGN JUDGMENT, 20 M. 112.

**Karnam.**

(1) *In a permanently-settled estate—Regulation* XXV *of* 1802, *ss.* 8, 11—*Regulation* XXIX *of* 1802, *s.* 5—*Right to dismiss a karnam—Delegation of such right to lessees of zemindari—Damages accrued by a karnam's neglect of a statutory duty.*—The lessees of a zemindari are not entitled to sue for the removal of a karnam from office, though their lease contains a provision purporting to authorise them to appoint and remove karnams, but if they suffer any loss from the karnam's neglect of his statutory duty, they are entitled to bring an action for damages against him. KUMARASAMI PILLAI v. ORR, 20 M. 145 ... 101

(2) See INAM, 21 M. 47.

**Kattubadi.**

See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 21 M. 116.

**Laches.**

See SPECIFIC RELIEF ACT (I OF 1877), 21 M. 42.

**Land Acquisition Act (X of 1870).**

(1) See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 20 M. 155.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 269.

**Land Acquisition Act (I of 1894).**

See COURT FEES ACT (VII OF 1870), 21 M. 269.

**Landlord and Tenant.**

(1) *Malabar tenants' right to compensation for improvements—Compensation for improvements and arrears of rent set off.*—As regards the right to the value of improvements, there is no distinction between a tenant under a kanom and under a verumpattom. The right of the landlord to set off against the value of the improvements any rent due to him must prevail against any alienation made by the tenant of his right to compensation. ERESSA MENON v. SHAMU PATTER, 21 M. 138 ... 454

(2) *Zemindar and raiyat—Relation between.*—A raiyat cultivating land in a permanently-settled estate is *prima facie* not a mere tenant form year to year,

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but the owner of the kudivaram right in the land he cultivates. VENKATANARASIMHA NAIDU v. DANDAMUDI KOTAYYA, 20 M. 299 = 7 M.L.J. 251... 218

(3) See ACT I OF 1887 (MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS, MADRAS), 20 M. 435.

(4) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 375.

**Lease.**

(1) See MALABAR LAW (ALIENATION), 21 M. 144.

(2) See REGISTRATION ACT (III OF 1877), 20 M. 58, 21 M. 109.

(3) See STAMP ACT (I OF 1879), 21 M. 358.

**Leave to sue.**

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 406.

(2) LIMITATION ACT (XV OF 1877), 20 M. 48.

**Legal Representative.**

(1) See CIV. PRO. CODE (ACT XIV of 1882), 20 M. 51, 20 M. 446.

(2) See COLLUSIVE DECREE, 20 M. 323.

**Lessee.**

See KARNAMS, 20 M. 145.

**Letters of Administration.**

See EVIDENCE ACT (I OF 1872), 21 M. 492.

**Letters Patent.**

(1) S. 15—Appeal under Letters Patent—Civ. Pro. Code, s. 588—Powers of Appellate Court under s. 588—See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 152.

(2) S. 15—Civ. Pro. Code—Act XIV of 1882, s. 588—See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 407.

**License.**

(1) See ACT IV OF 1884 (DISTRICT MUNICIPALITIES, MADRAS), 21 M. 293.

(2) See ACT I OF 1886 (ABKARI, MADRAS), 21 M. 63.

**Lien.**

See LIMITATION ACT (XV OF 1877), 21 M. 141.

**Limitation.**

(1) *Adverse possession—Rent Recovery Act (Madras)—Act* VIII *of* 1865—*Omission by inamdar to obtain registration of title under Regulation* XXVI *of* 1802—*Effect of.*—An inamdar had not obtained registration of his title under the registered landlord, and could not therefore sue to enforce acceptance of pattas, and had not collected rent from the tenants for more than 12 years: *Held*, that the tenants had not by reason of these facts acquired rights against the inamdar by adverse possession. SRINIVASARAGAVA AYYANGAR v. MUTTUSAMI PADAYACHI, 20 M. 6 ...

(2) *Adverse possession—Suit for ejectment by a jenmi—Defendant in possession under Government cowle.*—The plaintiffs sued for possession of land which was found to be their jenm. It appeared that the defendant had been in possession for more than twelve years under a cowle from Government, which provided that the grant of the cowle should not affect the jenmi's right, but that the defendant had never recognized the plaintiffs' title: *Held*, that the suit was barred by limitation. MUNIAPPAN CHETTI v. MUPPIL NAYAR, 21 M. 169 = 8 M.L.J. 117 ... 476

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(3) *Order to pay money—Money paid after due date.*—When an order has been made for the payment of money in a suit on a certain date and the Court was closed on that date, a payment made on the following day would be a good payment for the purposes of the order. ARAVAMUDU AYYANGAR v. SAMIYAPPA NADAN, 21 M. 385 ... 629

(4) Regulation VI of 1831 (Madras), s. 3—Village service inam—Village blacksmith—See REGULATION VI OF 1831 (HEREDITARY OFFICE, MADRAS), 21 M. 134. 8

(5) See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 20 M. 449, 21 M. 413.

(6) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 448.

(7) See HINDU LAW (PARTITION), 20 M. 459.

(8) See INTEREST, 20 M. 371.

(9) See LIMITATION ACT (XV OF 1877), 20 M. 40, 20 M. 245.

(10) See SPECIFIC RELIEF ACT (I OF 1877), 21 M. 42, 21 M. 373.

(11) See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 M. 253.

**Limitation Act (XV of 1877).**

(1) *S. 4, Civ. Pro. Code, s. 54—Court-Fees Act—Act* VII *of* 1870, *ss.* 6, 28—*Presentation of plaint improperly stamped.*—A suit is not instituted, within the meaning of the explanation to s. 4 of the Limitation Act, by the presentation of a document purporting to be a plaint, if that document, while not undervaluing the claim, is written on paper that does not bear the proper Court-fee. VENKATARAMAYYA v. KRISHNAYYA, 20 M. 319=7 M.L.J. 257 ... 226

(2) *S. 4—Gazetted holiday—Computation of time.*—In calculating the time allowed by law for the presentation of an appeal to a District Court, an appellant is entitled to deduct the last day being a gazetted holiday, although the District Judge held his Court on that day. BOYAMMA v. BALAJEE RAU, 20 M. 469 ... 333

(3) *S. 5—Appeal admitted after time by District Court—Power of Subordinate Court to whom the appeal is transferred.*—A District Court by an *ex-parte* order admitted an appeal filed after the expiry of the period of limitation and transferred it for disposal to the Subordinate Court, in which objection was taken that the appeal was time-barred. The Subordinate Judge held that he could not entertain the objection, and he heard the appeal and remanded the suit: *Held*, that the Subordinate Court had jurisdiction to entertain and dispose of the objection, and that the objection was sound and that the order of remand should be set aside. KRISHNA BHATTA v. SUBRAYA, 21 M. 228=7 M.L.J. 188 ... 516

(4) *S. 5—Suit under s. 77 of Registration Act—Act* III *of* 1877—*Applicability of Limitation Act, s. 5—Filing of suit on re-opening of Court.*—When the period of limitation, prescribed by s. 77 of the Indian Registration Act, 1877, for suits brought under that section, expires on a day when the Court is closed, s. 5 of the Indian Limitation Act, 1877, does not apply, and the suit, if instituted on the day that the Court re-opens, is barred. APPA RAU SANAYI ASWA RAU v. KRISHNAMURTHI, 20 M. 249=7 M.L.J. 94... 177

(5) *Ss.* 6, 12—*Rent Recovery Act—Act* VIII *of* 1865 (*Madras*), *ss.* 18, 69—*Deduction of time occupied in obtaining copy of judgment appealed against.*—A tenant whose property had been distrained for arrears of rent sued under Rent Recovery Act, s. 18, by way of appeal against the distraint. The

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Revenue Court decided in his favour. The landlord preferred an appeal under s. 69 more than thirty days after the date when the decision was pronounced. He claimed that the time occupied in procuring a copy of the judgment appealed against should be deducted in the computation of the thirty-days' period of limitation: *Held*, that the appellant was not entitled to have the deduction made, and that the appeal was barred by limitation. KUMARA AKKAPPA NAYANIM BAHADUR v. SITHALA NAIDU, 20 M. 476. 338

(6) *Ss.* 7, 19, *sch.* II, *art.* 165—*Dispossession in execution—Application on behalf of a minor.*—Limitation Act, 1877, sch. II, art. 165, is applicable to a case where the applicant is a party to the decree which is being executed as well as when he is a stranger. But an application made on behalf of a minor objecting to dispossession more than thirty days after it took place is not barred by limitation by reason of Limitation Act, 1877, s. 7. RATNAM AYYAR v. KRISHNA DOSS VITAL DOSS, 21 M. 494 =8 M.L.J. 75 ... 706

(7) S. 10—Suit between co- trustees—Breach of trust—Court-Fees Act—Act VIII of 1870, s. 5—Objection as to Court fee paid on appeal. See BREACH OF TRUST, 20 M. 398.

(8) *S.* 14—*Cause of like nature—Misjoinder of causes of action—Want of leave under Civ. Pro. Code, s.* 44.—In March 1891 the plaintiff sued the defendant to recover the sum of money due on the taking of an account between the plaintiff and the defendant, who was his agent, and to recover possession of certain land. The plaintiff did not obtain leave under Civ. Pro. Code, s. 44, for the institution of this suit which was accordingly dismissed for misjoinder of causes of action. The plaintiff now instituted on 5th April 1893 two suits, the one for the money and the other for the land: *Held*, that the plaintiff was entitled under Limitation Act, s. 14, to have the time occupied in the previous proceedings deducted in the computation of the period of limitation applicable to his suit for money which accordingly was not barred by limitation. VENKITI NAYAK v. MURUGAPPA CHETTI, 20 M. 48 (F.B.) ... 34

(9) *S.* 19—*Acknowledgment — Deposition signed by the debtor.*—To satisfy the requirements of s. 19 of the Limitation Act, an acknowledgment of a debt must amount to an acknowledgment that the debt is due at the time when the acknowledgment is made. A record made by a Judge of the evidence given by a debtor as a witness at the trial of a suit and signed by the debtor is a writing signed by the debtor within the meaning of s. 19 of the Limitation Act. PERIAVENKAN UDAYA TEVAR v. SUBRAMANIAN CHETTI, 20 M. 239=6 M.L.J. 266 ... 170

(10) *S.* 28, *sch.* II, *art.* 10—*Civ. Pro. Code—Act* XIV *of* 1882, *s.* 214 —*Right of pre-emption asserted by one in possession under an* otti *mortgage in Malabar.*—Land in Malabar was in the possession of the defendants, and was held by them as *otti* mortgagees under instruments executed in August 1873 and January 1876. The plaintiff having purchased the *jenm* right under instruments executed and registered in May and June 1877, now sued in 1893 for redemption: *Held*, that the defendants' right of pre-emption was not extinguished under Limitation Act, s. 28, and that they were not precluded from asserting it by art. 10 owing to the lapse of time, and that Civ. Pro. Code, s. 214, was inapplicable to the case, because the persons asserting a right of pre-emption were in possession. KRISHNA MENON v. KESAVAN, 20 M. 305 ... 219

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(11) *S.* 28, *sch.* II, *art.* 124—*Right to a temple office and its endowments —Adverse possession—Civ. Pro. Code—Act* XIV *of* 1882, *s.* 13, *expl.* II—Res judicata.—Certain offices in a temple and the endowments attached thereto were held jointly by the members of two branches of a family, represented respectively by the plaintiff and the defendant. Long previously to 1872 the defendant's branch got into sole possession, and in that year a family settlement was arrived at by which it was arranged that the offices should be held in rotation and the lands in equal shares; and, in accordance with this settlement, a certain village forming part of the endowment was delivered to the plaintiff's branch of the family. In 1889 the defendant brought a suit to recover a moiety of that village and an issue was raised whether he enjoyed the offices and the landed property in his independent right or as a servant for wages. His suit was dismissed on the ground that the offices and emoluments were indivisible and went by right to the older branch of the family. The plaintiff now sued in 1895 to establish his right to the entire offices and to recover possession of the other village: *Held*, that it was open to the defendant to assert in this suit a title by adverse possession as that had been made a ground of attack, though not the basis of his claim in the former suit, and that the defendant had acquired a divisible right to a moiety by twelve years' adverse possession and that the suit should, to that extent, be dismissed. ALAGIRISAMY NAICKAR v. SUNDARESWARA AYYAR, 21 M. 278 ... 552

(12) *Art.* 12—*Rent Recovery Act—Act* VIII *of* 1865 (*Madras*), *ss.* 38, 39, 40.—Where a plaintiff sued to recover land alleged to have been sold under the provisions of the Rent Recovery Act, alleging that the provisions of s. 7 of that Act had not been complied with and that therefore the sale was illegal: *Held*, that the suit could not proceed without setting aside the sale and that the sale having taken place more than a year before the institution of the suit, the suit was barred. RAGAVENDRA AYYAR v. KARUPPA GOUNDAN, 20 M. 33=6 M.L.J. 278 ... 23

(13) *Sch.* II, *art.* 12 (*a*)—*Dispossession.*—Limitation Act, sch. II, art. 12 (*a*), is not applicable to a case in which dispossession is the cause of action and in which the plaintiff was not a party to, or bound by, the sale: *Held*, accordingly, that a suit brought in 1892 to recover possession of the plaintiff's share of land sold by mistake in execution of a decree against his uncle in 1881, was not barred by limitation. KADAR HUSSAIN v. HUSSAIN SAHEB, 20 M. 118 (F.B.)=7 M.L.J. 52 ... 82

(14) *Arts.* 61, 99, 120—*Decree for rent against tenants jointly—Execution against one defendant—Suit by him for contribution.*—The holder of a zemindari village obtained a decree jointly against sixty-eight persons, including the present plaintiff and defendants, for Rs. 4,100 being rent accrued due on lands in the village and in execution he brought to sale property of the plaintiff and on 28th October 1889 he received out of the sale-proceeds, Rs. 2,650. The share payable by the plaintiff was Rs. 183-10-10 only, and he instituted the present suit against the defendants on 28th October 1892 to recover the amount which they were liable to contribute: *Held*, that Limitation Act, sch. II, art. 99, did not govern the case and that whether art. 61 or art. 120 was applicable, the suit was not barred by limitation. PATTABHIRAMAYYA NAIDU v. RAMAYYA NAIDU, 20 M. 23 ... 16

(15) *Sch.* II, *arts.* 97, 116, 120—*Transfer of Property Act—Act* IV *of* 1882, *s.* 68 —*Suit for mortgage money by mortgagee on disturbance of possession.*—The

**Limitation Act (XV of 1877)**—(*Continued*). PAGE

defendants demised certain land to the plaintiff under a registered kanom deed in 1888. The plaintiff was evicted in February 1893. He now sued in 1896 to recover the amount of the kanom: *Held*, that the period of limitation applicable to the suit was six years and that the suit was not barred by limitation. UNICHAMAN v. AHMED KUTTI KAYI, 21 M. 242=8 M.L.J. 81 ... 527

(16) *Sch.* II, *art.* 111—*Enforcement of vendor's lien.*—In 1887 the plaintiff sold land to defendant No. 1, who, in 1894, while part of the purchase money remained unpaid, sold it to defendants Nos. 2 to 4, who had notice of this fact. The plaintiff now in 1895 sued to enforce his vendor's lien: *Held*, that the suit was barred by Limitation Act, 1877, sch. II, art. 111, NATESAN CHETTI v. SOUNDARARAJA AYYANGAR, 21 M. 141=7 M.L.J. 275 ... 45

(17) *Sch.* II, *arts.* 115, 116 — *Covenant implied in registered sale-deed—Transfer of Property Act—Act* IV *of* 1882, *s.* 55—*Implied covenant for title—Damages for breach—Civ. Pro. Code—Act* XIV *of* 1882, *s.* 13—Res judicata.—On 8th February 1889 the defendant sold to the plaintiff, under a registered conveyance containing no express covenant for title, land of which he was not in possession, and the purchase money was paid. The plaintiff and the defendant sued to recover possession, but failed on the ground that the vendor had no title. The plaintiff now sued on 7th February 1895 to recover with interest the purchase money and the amount of costs incurred by him in the previous litigation: *Held*, that the suit was not barred by limitation, that the defendant was not entitled to give evidence of his alleged title, and that the plaintiff was entitled to the relief sought by him. KRISHNAN NAMBIAR v. KANNAN, 21 M. 8 ... 362

(18) *Art.* 118—*Suit for possession by Hindu widow as heiress—Defendant in possession under an alleged adoption—Limitation.*—A Hindu died in 1884, leaving the plaintiff, his widow, and certain landed and other properties. The defendant claimed, to the knowledge of the plaintiff in 1885, to have been adopted by the deceased, and from that date he had claimed as an adopted son to be entitled to the estate of which the plaintiff never enjoyed possession. She now sued in 1893 for possession with mesne profits alleging in the plaint that the adoption had been falsely set up, but seeking no declaration with regard to it: *Held*, that the suit was barred by limitation. PARVATHI AMMAL v. SAMINATHA GURUKAL, 20 M. 40=6 M.L.J. 272 ... 29

(19) *Art.* 132—*Limitation—Hypothecation bond for payment on certain date—On default in payment of interest whole amount payable on demand—Meaning of "payable on demand."*—When a hypothecation bond provided for the repayment of the principal sum on a certain date with interest in the meantime payable monthly, and further provided that, on default in payment of interest, the principal and interest should become payable on demand: *Held*, that the period of limitation prescribed by art. 132 of the Limitation Act began to run from the date of the default. PERUMAL AYYAN v. ALAGIRISAMI BHAGAVATHAR, 20 M. 245=7 M.L.J. 222 ... 174

(20) *Sch.* II, *art.* 132—*Suit on a hypothecation bond, dated* 1876, *to secure money payable on demand.*—In a suit to recover principal and interest due on a hypothecation bond executed before the Transfer of Property Act was passed to secure a loan payable on demand, it appeared that the plaint was filed more than twelve years after the date of the document sued on: *Held*, that the suit was governed by Limitation Act, sch. II, art.

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132, and that an actual demand was not necessary to establish a starting point for limitation and that the suit was barred by limitation. PERIANNA GOUNDAN v. MUTHUVIRA GOUNDAN, 21 M. 139=7 M.L.J. 315 ... 455

(21) *Sch.* II, *arts.* 132, 147—*Mortgage—Suit for sale.*—On 2nd July 1879 the defendant mortgaged to the plaintiff certain property to secure payment of a debt with interest. The instrument purported to be a mortgage with possession, and it contained a covenant to repay the mortgage amount on the 8th March 1883. The plaintiff never obtained possession and he brought a suit on the 29th June 1894 to recover the principal and interest by the sale of the land: *Held*, that the suit was governed by art. 132 and not art. 147 of Limitation Act, sch. II, and was accordingly barred by limitation. RAMACHANDRA RAYAGURU v. MODHU PADHI, 21 M. 326 (F.B.) ... 587

(22) *Sch.* II, *art.* 134—*Sale by mortgagee as owner.*—A mortgaged land to B and then sold it to C, and subsequently sold it to B ignoring the previous sale. C now brought a suit for redemption and B, who had been in possession for many years, pleaded limitation: *Held*, that the suit was governed by Limitation Act, sch. II, art. 134. REGO v. ABBU BEARI, 21 M. 151 ... 463

(23) Art. 141—Suit by reversioner on the death of female heir—Adverse possession—Hindu Law—Law of succession. See HINDU LAW (SUCCESSION) 20 M. 493.

(24) *Sch.* II, *arts.* 142, 144—*Adverse possession—Acts of ownership.*—The defendant had used as a backyard a small piece of land situated between his house and that of the plaintiff, who was his brother, for a period of more than twelve years. In 1894 the defendant began to build on it, whereupon the plaintiff protested and now sued for possession: *Held*, that the suit was not barred by limitation. CHOKKALINGA NAICKEN v. MUTHUSAMI NAICKEN, 21 M. 53 ... 394

(25) Sch. II, arts. 142, 144—Suit for partition between co-owners—Possession of tenants—Adverse possession—Civ. Pro. Code—Act XIV of 1882, s. 43—Cause of action.—See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 153.

(26) *Sch.* II, *arts.* 178, 179—*Application for execution "struck off the file"—Further application for execution—Renewal of previous application.*—An application for execution of a decree of a District Munsif was made in April 1893, but was struck off the file on 20th July 1893, on a stay of execution having been ordered by the Subordinate Judge. After the termination of the proceedings in the Subordinate Court, the decree-holder applied again for execution on 6th July 1896: *Held*, that the latter application should be regarded as a continuation of the former, and was not barred by limitation. SASIVARNA TEVAR v. ARULANANDAM PILLAI, 21 M. 261=8 M.L.J. 18 ... 540

(27) *Sch.* II, *art.* 179—*Application for execution—Continuation of previous application.*—In June 1892, an application was made for execution of a decree, and it was dismissed, the applicant being relegated to a suit to establish his right. He did not sue, but in September 1892 he put in a fresh application to execute, which was dismissed. He then sued, and in March 1895 a decree was passed in his favour. He now put in a petition in October 1895, praying that his petition of September 1892 be revived or continued: *Held*, that the petition was barred by limitation. SURYANARAYANA PANDARATHAR v. GURUNADA PILLAI, 21 M. 257=8 M.L.J. 25 ... 538

**Limitation Act (XV of 1877)—(*Concluded*).** PAGE

(28) Art. 179—Application for restitution—Period of limitation—Fraud—Civ. Pro. Code, s. 583—See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 448.

(29) *Sch.* II. *art.* 179—*Step in aid of execution—Application for lists of properties attached.*—An application by a decree-holder for a list of the properties attached in execution of his decree is not a step in aid of execution within the meaning of the Limitation Act, sch. II, art. 179. RANGA CHARIAR v. BALARAMASAMI CHETTI, 21 M. 400=8 M.L.J. 53 ... 639

**Lottery.**

See COMPANIES ACT (VI OF 1882), 20 M. 68.

**Lunatic.**

*Act* XXXV *of* 1858—*Guardian for property of lunatic—Lunatic trustee of a mutt.*—A guardian may be appointed under XXXV of 1858 to the property vested in a lunatic as the head of a mutt. SITARAMA CHARYA v. KESAVA CHARYA, 21 M. 402 ... 641

**Malabar Law.**

1.—ADOPTION.
2.—ALIENATION.
3.—JOINT FAMILY.
4.—MORTGAGE.
5—PARTITION.
6—WILL.

———**1.—Adoption.**

*By the Karnavan of a Marumakkatayam tarwad—Want of consent by the rest of the tarwad—Civ. Pro. Code, s.* 365—*Legal representative.*—A tarwad in Malabar subject to Marumakkatayam Law was reduced in number to two persons, *viz.*, the karnavan and his younger brother the plaintiff. They quarrelled, and the former without the consent of the latter adopted as members of the tarwad his son and daughter and her children. On his death the plaintiff sued for possession of the tarwad property and for a declaration that the adoptions were invalid :—*Held*, that the plaintiff was entitled to the relief asked for. After an appeal was presented by plaintiff, who had obtained a decree for possession but no other relief, he died leaving a will making certain dispositions of the property to which he was solely entitled on the assumption that the adoptions in question were invalid, and his executor was admitted as his legal representative for prosecuting the appeal. PAYYATH NANU MENON v. THIRUTHUPALLI RAMAN MENON, 20 M. 51=6 M.L.J. 241 ... 36

———**2.—Alienation.**

(1) *Powers of stani—Lease by stani of forest land attached to the stanom.*—A stani in Malabar is not a tenant for life impeachable for waste. He is a person who represents the estate for the time being, and it is open to him to make a lease of forest land for a term of years, and the mere fact that the alienation is intended to hold good after his life-time will not invalidate it. ITTIRARICHAN UNNI v. KUNJUNNI, 21 M. 144 ... 458

(2) See LANDLORD AND TENANT, 21 M. 138.

———**3.—Joint Family.**

*Decree against karnavan binding on tarwad.*—A decree in a suit in which the karnavan of a Numbudri illom or a Marumakkatayam tarwad is, in his representative capacity, joined as a defendant and which he honestly defends is binding on the other members of the family not actually made parties. VASUDEVAN v. SANKARAN, 20 M. 129 (F.B.)=7 M.L.J. 102 ... 90

**Malabar Law—4.—Mortgage.** PAGE

(1) *Kanom—Mortgage—Redemption—Improvements—Depreciation of, between decree and date of redemption.*—A decree for the redemption of a kanom in Malabar was passed in December, 1894, when there were on the land improvements in the form of trees, &c., to the value of Rs. 1,429. Within the six months limited by the decree for redemption the mortgagor applied for execution, and it appeared that the value of improvements had diminished by the loss of trees to the value of Rs. 157. The loss was the result of want of water, and was not attributable to neglect on the part of the mortgagee: *Held*, that the loss should fall on the mortgagee. KRISHNA PATTER v. SRINIVASA PATTER, 20 M. 124 ... 87

(2) See ACT I OF 1887 (MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS, MADRAS), 21 M. 411.

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 352.

(4) See LIMITATION ACT (XV OF 1877), 20 M. 305; 21 M. 242.

(5) See REGISTRATION ACT (III OF 1877), 20 M. 484.

(6) See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 M. 291.

**———5.—Partition.**

See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 153.

**———6.—Will.**

*Pensions Act — Act* XXIII *of* 1871, s. 12—*Political pension payable to Zamorin of Calicut—Power of disposition by a will.*—The Zamorin of Calicut, although a member of a Kovilagom, is entitled to dispose of his separate property by a will. The Zamorin, by his will, bequeathed to the plaintiff the malikhana due to him from the Government which might be in arrears at the time of his death. The malikhana was a political pension of Rs. 6,000 a month, payable quarterly. The Zamorin died on the 6th of August 1892. The plaintiff now sued to recover the proportionate amount due on account of the pension for the current quarter up to the time of the Zamorin's death: *Held*, that the plaintiff was not entitled to recover the amount sued for. SRIDEVI v. KRISHNAN, 21 M. 105 ... 430

**Marriage.**

See ACT XV OF 1872 (CHRISTIAN MARRIAGE), 20 M. 12.

**Material Irregularity.**

See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 159.

**Merchant Shipping Act, Amendment Act, (25 and 26 Vic., C. 63).**

S. 3—*Transfer of a ship—Equitable title—Destruction after agreement for sale.*—The defendant agreed to purchase a ship from the plaintiff, but the sale was not completed in the manner prescribed by the Merchant Shipping Acts. The ship was delivered to the defendant in pursuance of the agreement and subsequently foundered in port owing to accidental causes. The plaintiff sued to recover the balance of the purchase money: *Held*, that the plaintiff was not entitled to recover. RAMANADAN CHETTI v. NAGOODA MARACAYAR, 21 M. 395 ... 636

**Mesne Profits.**

See COURT-FEES ACT (VII OF 1870), 21 M. 371.

**Minor.**

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 91.

(2) See LIMITATION ACT (XV OF 1877), 21 M. 494.

(3) See PROMISSORY NOTE, 21 M. 391.

**Misappropriation.** PAGE

See EXECUTION OF DECREE, 20 M. 224.

**Misjoinder.**

(1) See LIMITATION ACT (XV OF 1877), 20 M. 48.
(2) See SPECIFIC RELIEF ACT (I OF 1877), 21 M. 373.

**Mokhassa-inamdars.**

See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 21 M. 116.

**Mortgage.**

1.—GENERAL.
2.—ANOMALOUS.
3.—CONTRIBUTION.
4.—PRIORITY.
5.—REDEMPTION.
6.—SALE.
7.—USUFRUCTUARY.

———1.—**General.**

(1) *Covenant to pay interest—Interest* 'post diem'. —In a suit on a mortgage, it appeared that the instrument sued on was executed to secure a sum of money arrived at by calculating interest on sums previously due by the mortgagors, and it was expressed to be for securing the payment of that principal, together with interest as it might accrue annually. There was also a provision for compound interest. The principal was payable on 14th July 1886, and there was no express stipulation to pay interest after that date: *Held*, that the mortgagees were entitled to interest for the subsequent period. PEDDA SUBBARAYA CHETTI v. GANGA RAZULUNGARU, 20 M. 149=7 M. L. J. 18 ... 104

(2) *Discharge of encumbrance by intending purchaser*—' Bona fides .' —A having mortgaged land to B agreed to sell it to C and then to D, in whose favour he executed a conveyance bearing a date prior to the contract with C. C sued A and D to have the conveyance set aside and his contract specifically performed and a decree was passed in his favour. While the suit was pending, D paid off B and now sued A and C to recover the money paid by him:—*Held*, that the plaintiff occupied the position of the mortgagee whom he had paid off, and that the sum constituted a charge on the land. SYAMALARAYADU v. SUBBARAYUDU, 21 M. 143 ... 457

(3) Interest 'post diem'—Limitation. See INTEREST, 20 M. 371.

(4) See STAMP ACT (I OF 1879), 21 M. 358.

(5) See TRANSFER OF PROPERTY ACT (IV OF 1882), 20 M. 274, 21 M. 32, 222.

———2.—**Anomalous.**

See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 M. 1.

———3.—**Contribution.**

See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 M. 369.

———4.—**Priority.**

(1) *Priority—Merger of former mortgage in decree—Right of subsequent mortgagee to keep the prior incumbrance alive.*—Where there is a subsisting prior incumbrance and a subsequent mortgagee advances money for the purpose of discharging it, but it is for his benefit still, to keep it alive, his right to keep it alive is not affected by the fact that the prior incumbrance had at the time taken the form of a decree. PURNAMAL CHUND v. VENKATA SUBBARAYALU, 20 M. 486=7 M.L.J. 198 ... 344

(2) See TRANSFER OF PROPERTY ACT (IV OF 1882), 20 M. 274.

**Mortgage—5.—Redemption.** PAGE

(1) *Agreement by mortgagor to sell the mortgage premises to the mortgagee—Fetter on the equity of redemption.*—A stipulation in a mortgage that if the mortgage money is not paid on the due date, the mortgagor will sell the property to the mortgagee at a price to be fixed by umpires, is unenforceable as constituting a fetter on the equity of redemption. KANARAN v. KUTTOOLY, 21 M. 110=8 M.L.J. 62 ... 434

(2) Malabar Kanom—Redemption—Improvements—Depreciation of, between decree and date of redemption. See MALABAR LAW (MORTGAGE), 20 M. 124.

(3) *To a co-owner—Suit to redeem—Right of one or more co-owners to redeem in absence of partition.*—When several owners of undivided shares in immoveable property mortgage their share with possession to another undivided sharer, a smaller number than the whole body of co-mortgagors cannot sue to redeem the mortgage until there has been a partition of the property mortgaged among the several co-owners. THILLAI CHETTI v. RAMANATHA AYYAN, 20 M. 295 ... 210

(4) See ACT I OF 1887 (MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS, MADRAS), 21 M. 411.

(5) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 82, 108, 21 M. 18.

(6) See LIMITATION ACT (XV OF 1877), 21 M. 151.

(7) See MALABAR LAW (MORTGAGE), 20 M. 124.

(8) See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 M. 64, 369.

**——6.—Sale.**

(1) *Decree on first mortgage, a puisne mortgagee not being joined—Purchase of mortgaged property by decree-holder for inadequate price—Right of puisne mortgagee — Improvements — Interest.*—A mortgaged land to B and then to C. B sued on his mortgage and obtained a decree for sale without joining as defendant C, of whose mortgage he had notice; D, the son of the decree-holder, became the purchaser in execution and improved the land at a considerable cost. C now sued the sons and representative of A and B (both deceased) on his mortgage and sought a decree for sale:—*Held*, (1) that the plaintiff was entitled to a decree for sale subject to the right of the representatives of B, if the purchaser did not elect to redeem; (2) that the purchaser was not entitled to allowances for improvements; (3) that the plaintiff was entitled to interest at the agreed rate to the date of decree. RANGAYYA CHETTIAR v. PARTHASARATHI NAICKER, 20 M. 120 ... 84

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 362, 21 M. 416.

(3) See LIMITATION ACT (XV OF 1877), 21 M. 326.

(4) See TRANSFER OF PROPERTY ACT (IV OF 1882), 20 M. 35, 21 M. 364.

**——7.—Usufructuary.**

See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 M. 476.

**Mortgagee.**

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 378.

(2) See CONTRACT ACT (IX OF 1872), 20 M. 461.

(3) See INTEREST, 20 M. 371.

**Muhammadan Law—1.—Inheritance.** PAGE

*Shiyas—Inheritance by childless widows.*—The childless widow of a Muhammadan of the Shiya school is not entitled to any share in the land left by her husband. MIR ALLI HUSSAIN v. SAJUDA BEGUM, 21 M. 27 ... 375

———2.—**Maintenance.**

See CRIM. PRO. CODE (ACT X OF 1882), 20 M. 3.

**Mysore.**

See CRIM. PRO. CODE (ACT X OF 1882), 20 M. 444.

**Nattamgar.**

See INAM, 20 M. 454.

**Natural Stream.**

See ACT V OF 1882 (FOREST, MADRAS), 20 M. 279.

**Negligence.**

See CRIM. PRO. CODE (ACT X OF 1882), 21 M. 74.

**Negotiable Instrument.**

*Benami transaction—Right of benamidar to sue.*—The payee and holder of a promissory note is not debarred from suing on it by reason of the fact that a third person is really interested in it. BOJJAMMA v. VENKATARAMAYYA, 21 M. 30 378

**Negotiable Instruments Act (XXVI of 1881).**

S. 4—*Promissory note.*—A debtor signed and delivered to his creditor an unstamped document as follows:—"The account executed on . . by . . . to . . . The amount which I have this day received from you in cash is Rs. 700. This sum I am bound to pay you. Therefore, adding to this sum interest 'at 8 annas per cent. per mensem' I am liable to pay. This is the account in this manner executed with my consent": *Held*, that the document was not a promissory note and was admissible in evidence. TIRUPATHI GOUNDAN v. RAMA REDDI, 21 M. 49=7 M. L.J. 291 ... 391

**Non-joinder.**

See CONTRACT ACT (IX OF 1872), 21 M. 256.

**Notary Public.**

See EVIDENCE ACT (I OF 1872), 21 M. 492.

**Notice.**

(1) See ACT V OF 1884 (LOCAL BOARDS, MADRAS), 21 M. 296.
(2) See PENAL CODE (ACT XLV OF 1860), 20 M. 1.

**Occurrence Reports.**

See CRIM. PRO. CODE (ACT X OF 1882), 20 M. 189.

**Parties.**

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 375, 487, 21 M. 45, 352. 417.
(2) See CONTRACT ACT (IX OF 1872), 21 M. 256.
(3) See MORTGAGE (SALE), 20 M. 120.
(4) See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 M. 64.

**Partnership.**

(1) Accounts—Civ. Pro. Code—Act XIV of 1882, s. 215—Decree for account of dissolved partnership—Taking of accounts.—See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 313. ...

**Partnership—(*Concluded*).** PAGE

(2) *Settlement of accounts.—Promise to pay balance.*—The plaintiff and defendant, having carried on business in partnership, settled their accounts and struck a balance of Rs. 196, which the defendant agreed orally to pay in a month. The plaintiff now sued in a Small Cause Court for the amount not asking for an account to be taken :—*Held*, that the suit was maintainable. MARIMUTHU v. SAMINATHA PILLAI, 21 M. 366 ... 615

(3) See CONTRACT ACT (IX OF 1872), 21 M. 256.

**Patta.**

(1) See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 21 M. 116, 148, 503.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 392.

(3) See INAM, 20 M. 454.

**Penal Code (Act XLV of 1860).**

(1) Ss. 99, 186, 353—Local Boards Act (Madras)—Act V of 1884, ss. 77, 78, 81, 94, 163—Service of notice of demand of house-tax—Omission to fill up the house-register completely—Illegal distraint—Resistance to distraining officer—See ACT V OF 1884 (LOCAL BOARDS, MADRAS), 21 M. 296.

(2) S. 109—See CRIM. PRO. CODE (ACT X OF 1882), 20 M. 8.

(3) S. 174—*Non-attendance in obedience to an order of a public servant—Absence of public servant.*—The offence contemplated by s. 174, Penal Code, is an omission to appear at a particular time and at a particular place before a specified public functionary. Where, therefore, the public servant was absent on the date fixed in a summons:—*Held*, that the person summoned could not be convicted under this section though he failed to attend, having the intention to disobey the summons. QUEEN-EMPRESS v. KRISHTAPPA, 20 M. 31 = 1 Weir 83 ... 22

(4) S. 183—*Resistance to the taking of property—Attachment of goods not being property of judgment-debtor.*—A decree having been passed against the assets of a deceased debtor, execution was taken out and the officer of Court proceeded to seize certain goods. The accused successfully resisted the seizure asserting that the goods seized were his own. He was thereupon charged with having committed an offence under the Penal Code, s. 183, but he was acquitted for want of proof by the prosecution that the goods were assets of the deceased :—*Held*, that the acquittal was wrong and should be set aside. QUEEN-EMPRESS v. TIRUCHITTAMBALA PATHAN, 21 M. 78 = 1 Weir 123 ... 411

(5) S. 188—*Local Boards Act—Act V of 1884 (Madras), ss. 98, 100—Disobedience to notice.*—The President of a Local Board, acting under Act V of 1884, issued a notice calling upon a person to remove certain encroachments on a public road within ten days:—*Held* that such a notice was not an order within the meaning of s. 188, Indian Penal Code, and a person neglecting to obey it could not be convicted under that section. QUEEN-EMPRESS v. SUBRAMANIAN, 20 M. 1 = 1 Weir 140 = 1 Weir 797. 1

(6) Ss. 193, 211—See CRIM. PRO. CODE (ACT X OF 1882), 21 M. 237.

(7) S. 211—*False charge of dacoity made to a Police Station-house Officer.*—A false charge of dacoity was made to a Police Station-house Officer, who, after some investigation, referred it to the Magistrate as false, and the Magistrate ordered the charge to be dismissed without taking any action against the parties implicated. The person who preferred the charge was now tried under Penal Code, s. 211, and was found to have acted with the intent and the knowledge therein mentioned, and he was convicted

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and sentenced to four years' rigorous imprisonment:—*Held*, that the prisoner had instituted criminal proceedings within the meaning of that soction, and that the conviction and sentence were in accordance with law. QUEEN-EMPRESS v. NANJUNDA RAU, 20 M. 79=7 M.L.J. 16=1 Weir 188 ... 55

(8) *Ss.* 268, 283—*Encroachment on public highway—Public nuisance.*—Whoever appropriates any part of a street by building over it infringes the right of the publio *quoad* the part built over, and thereby commits an offence punishable under Penal Code, s. 290, if not one punishable under s. 283. QUEEN-EMPRESS v. VIRAPPA CHETTI, 20 M. 433=1 Weir 253 ... 307

(9) *Ss.* 302, 304, 324—*Good faith—Order of superior officer—Firing on an unlawful assembly.*—A caused orops to be sown on land, as to the enjoyment of which there was a dispute between her and B. Persons having prooeeded to reap the crops on behalf of B, the servants of A went to the place with the Station-house Officer and some oonstables who were armed. The Station-house Offioer ordered the reapers to leave off reaping and to disperse, but they did not do so; he then told one of the constables to fire, and he fired into the air. Some of the reapers remained and assumed a defiant attitude. The Station-house officer, without attempting to make any arrests and without warning the reapers that, if they did not desist from reaping, they would be fired at, gave orders to shoot, and one of the constables fired and mortally wounded one of the reapers. It was found that neither the Station-house officer nor the last-mentioned constable believed that it was necessary for the publio security to disperse the reapers by firing on them: *Held*, that the Station-house officer and the oonstable were not acting in good faith and that the order to shoot was illegal and did not justify the oonstable and that both he and the Station-house offioer were guilty of murder. QUEEN-EMPRESS v. SUBBA NAIK, 21 M. 249=1 Weir 42, 310 ... 532

**Plaint.**

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 467; 21 M. 234.
(2) See EJECTMENT, 21 M. 288.

**Pleader.**

(1) See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), 20 M. 365.
(2) See CRIM. PRO. CODE (ACT X OF 1882), 20 M. 87.

**Pleader and Client.**

*Authority of pleader—Compromise entered into by pleader without the client's consent.*—It is not oompetent to a pleader to enter into a compromise on behalf of his olient without his express authority to do so. JAGAPATI MUDALIAR v. EKAMBARA MUDALIAR, 21 M. 274=8 M.L.J. 40 ... 550

**Po-Brahman,**

See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 269.

**Police.**

(1) See CONFESSION, 21 M. 83.
(2) See CRIM. PRO. CODE (ACT X OF 1882), 20 M. 387.
(3) See PENAL CODE (ACT XLV OF 1860), 20 M. 79.

**Political Pension.**

See MALABAR LAW (WILL), 21 M. 105.

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**Poundage.**

See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 153.

**Power of Attorney.**

See EVIDENCE ACT (I OF 1872), 21 M. 492.

**Practice.**

(1) Civ. Pro. Code—Act XIV of 1882, ss. 59, 140—High Court Rules, Nos. 39, 43, 44, 47—See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 490.

(2) See CONTRACT, 20 M. 274.

**Pre-emption.**

Limitation Act—Act XV of 1877, s. 28, sch. II, art. 10—Civ. Pro. Code—Act XIV of 1882, s. 214—Right of pre-emption asserted by one in possession under an *otti* mortgage in Malabar—See LIMITATION ACT (XV OF 1877), 20 M. 305.

**Preliminary Point.**

See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 25, 407.

**Principal and Agent.**

See CONTRACT ACT (IX OF 1872), 20 M. 97.

**Privy Council.**

*Practice—Preparation of the copy of the record—Papers to be omitted.*—In a suit in which the Original Court had framed and decided several issues, the High Court on appeal confined their decision to the questions which, in their opinion, governed the case, leaving other issues undecided as not affecting the result after the decision to which they had come. Afterwards the suit was admitted to appeal in conformity with s. 603, Code of Civil Procedure. In the preparation of the printed copy of the record the question arose whether the copy should be made of the whole record, or of only so much of it as was material to the correctness of the High Court's decision. Their Lordships directed that only so much of the original record as bore upon, and was material to the questions decided by the High Court, and the subject of the appeal, should be printed in the copy. RAJA RAO VENKATA SURIYA MAHIPATI RAM KRISHNA RAO BAHADUR v. COURT OF WARDS, 20 M. 395 (P. C.) = 24 I. A. 194 = 7 Sar. P. C. J. 252 ... 231

**Procedure.**

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 313.

(2) See CRIM. PRO. CODE (ACT X OF 1882), 20 M. 88.

(3) See SUITS VALUATION, 21 M. 271.

**Profession-tax.**

See ACT IV OF 1884 (DISTRICT MUNICIPALITIES, MADRAS), 21 M. 5.

**Promissory Note.**

(1) *To a minor's guardian—Minor's suit by another next friend—Note not endorsed.*—An infant sued by his next friend to recover the balance due on a promissory note alleged to have been made and delivered on account of his estate to his mother and guardian who had not endorsed the note :—*Held*, that the suit was maintainable in the absence of an endorsement. GURUMURTI v. SIVAYYA, 21 M. 391 ... 683

(2) See CONTRACT ACT (IX OF 1872), 20 M. 84.

(3) See NEGOTIABLE INSTRUMENT, 21 M. 30.

(4) See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), 21 M. 49.

**Public Document.** PAGE

See CRIM. PRO. CODE (ACT X OF 1882), 20 M. 189.

**Public Highway.**

See PENAL CODE (ACT XLV OF 1860), 20 M. 433.

**Public Nuisance.**

See PENAL CODE (ACT XLV OF 1860), 20 M. 433.

**Public Servant.**

(1) See ACT V OF 1884 (LOCAL BOARDS, MADRAS), 21 M. 428.
(2) See PENAL CODE (ACT XLV OF 1860), 20 M. 31.

**Quantum Meruit.**

See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), 20 M. 365.

**Rateable Distribution.**

See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 103.

**Receiver.**

(1) Appointment of—Pensions Act—Act XXIII of 1871, s. 4—Suit relating to inam land granted before the time of the British Government—Confirmation of inam—Construction and enforceability of compromise of suit between members of grantee's family—Removal of manager—See ACT XXIII OF 1871 (PENSIONS), 21 M. 310.

(2) Moneys collected by receiver in execution of decree misappropriated by him—Discharge of judgment-debtor—See EXECUTION OF DECREE, 20 M. 224.

**Refund.**

(1) See ACT IV OF 1884 (DISTRICT MUNICIPALITIES, MADRAS), 21 M. 5.
(2) See SUCCESSION CERTIFICATE ACT (VII OF 1889), 21 M. 241.

**Registration.**

(1) See REGISTRATION ACT (III OF 1877), 20 M. 250, 254, 484, 21 M. 109.
(2) See SPECIFIC PERFORMANCE, 20 M. 19.

**Registration Act (III of 1877).**

(1) *Ss. 3, 17 (d)—Interest in land—Timber—Lease—Specific Relief Act—Act I of 1877, s. 36—Injunction.*—The plaintiff (who held on lease a share in a village and in the trees standing in the village tank), in consideration of Rs. 200, and a promissory note for Rs. 3,200, executed in favour of the defendant a document by which he assigned to the latter the right "to cut and enjoy the trees, &c.," for a period of four years from its date. The instrument was not registered. The defendant felled the trees which were mature at the date of the instrument and subsequently felled others since matured. The plaintiff now sued for a declaration of his title to the remaining trees and for an injunction to restrain the defendant from intermeddling therewith, alleging that he had sold to the defendant orally the right to fell only such trees as were then matured :—*Held*, that the unregistered instrument purported to convey an interest in immoveable property, and was not a lease and was inadmissible in evidence; and that the plaintiff was not entitled to relief by way of injunction or otherwise. SEENI CHETTIAR v. SANTHANATHAN CHETTIAR, 20 M. 58 (F.B.) = 6 M.L.J. 281 ... 41

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(2) S. 17—*Deed of relinquishment by tenant to land-holder.*—An instrument by which a tenant in a zemindari, in consideration of the zemindar waiving his right to arrears of rent accrued due, relinquishes the land to him, is not admissible in evidence, unless it is registered in accordance with law, although it may have been drawn up and delivered to the servants of the zemindar before he had signified his consent to waive his right to the arrears. RANGAYYA APPA RAU v. KAMESWARA RAU, 20 M. 367=7 M. L.J. 59 ... 261

(3) S. 17 (*c*)—*Agreement to renew a kanom and to credit as renewal fees a sum of money then due by plaintiff to defendant— Want of registration — Admissibility in evidence.*—*Per cur*: A written agreement to renew a kanom and to credit as renewal fees a sum of money then due is not an acknowledgment of money paid for the creation of an interest in land within the meaning of s. 17 (*c*) of the Registration Act, and therefore is admissible in evidence though unregistered: *Held*, that in such an agreement, the agreement to renew is severable from the rest of the agreement and the document, though unregistered, is admissible in evidence of the agreement to renew even if it were inadmissible for other purposes. KRISHNAN NAMBUDRI v. RAMAN MENON, 20 M. 484 ... 343

(4) S. 17 (*d*) —*Transfer of Property Act—Act* IV *of* 1882, *ss.* 4, 107—*Lease of a shop for three years—Registration.*—Leases falling under s. 107 of the Transfer of Property Act are compulsorily registrable notwithstanding the Government notification issued under the proviso to s. 17 (*d*) of the Registration Act. VAIRANANDA NADAR v. MIYAKAN ROWTER, 21 M. 109 ... 433

(5) Ss. 35, 40, 41—*Registration of wills after death of testator—Inquiry by registering officer into disability of testator.*—The procedure prescribed by s. 35 of the Indian Registration Act is not applicable to the registration of wills which, under s. 40 of that Act, are presented for registration after the death of the testator by persons claiming under them. ARUMUGAM PILLAI v. ARUNACHALLAM PILLAI, 20 M. 254 ... 181

(6) S. 50—*Registration—Loss of sale-deed.*—When a deed of sale of immoveable property for more than Rs. 100 is lost within the time allowed for the registration of the same, the purchaser may bring a suit against the vendor to compel the execution and registration of a fresh deed; and if, after the execution of the lost sale-deed, the vendor has resold the property by a registered deed and delivered possession thereof to another who has notice of the sale to the plaintiff, the latter is entitled, as against the subsequent purchaser, to a decree for the possession of the property. NALLAPPA REDDI v. RAMALINGACHI REDDI, 20 M. 250 ... 178

(7) S. 77—Suit under s. 77 of Registration Act—Act III of 1877—Applicability of Limitation Act, s. 5—Filing of suit on reopening of Court. See LIMITATION ACT (XV OF 1877), 20 M. 249.

**Regulation XXV of 1802 (Permanent Settlement, Madras).**

Ss. 8, 11—See KARNAM, 20 M. 145.

**Regulation XXVI of 1802 (Land Registration, Madras).**

See LIMITATION, 20 M. 6.

**Regulation XXIX of 1802 (Karnams, Madras).**

S. 5—See KARNAM, 20 M. 145.

**Regulation VI of 1831 (Hereditary Offices, Madras).** PAGE

*S.* 3—*Village service inam—Village blacksmith—Limitation.*—The mortgagee of maniam land attached to the hereditary office of village blacksmith sued in the Court of a District Munsif for possession, to which he claimed to be entitled under his mortgage ; and there was evidence that he had been in possession for many years up to a date not long prior to the suit: *Held*, that, as the plaintiff could have sued only under Regulation VI of 1831 in a Revenue Court, he could not, under Limitation Act, 1877, s. 28, acquire a title by prescription to the land. PICHUVAYYAN v. VILAKKUDAYAN ASARI, 21 M. 134=7 M.L.J. 196 ... 451

**Relinquishment.**

See REGISTRATION ACT (III OF 1877), 20 M. 367.

**Remand.**

See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 25, 152, 496.

**Rent.**

(1) See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 21 M. 136, 413, 503.

(2) See ACT I OF 1887 (MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS, MADRAS), 20 M. 435.

**Resident.**

See FOREIGN JUDGMENT, 20 M. 112.

**Res Judicata.**

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 392, 21 M. 18, 91.

(2) See LIMITATION ACT (XV OF 1877), 21 M. 8, 278.

**Restitution.**

See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 448.

**Revision.**

(1) See ACT I OF 1881 (VILLAGE COURTS, MADRAS), 21 M. 363.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 113, 398.

(3) See CRIM. PRO. CODE (ACT X OF 1882), 21 M. 124.

**Right to Office.**

See LIMITATION ACT (XV OF 1877), 21 M. 278.

**Riparian Owner.**

See ACT V OF 1882 (FOREST, MADRAS), 20 M. 279.

**Rules.**

See ACT VIII OF 1897 (REFORMATORY SCHOOLS), 21 M. 430.

**Sale.**

(1) See ACT II OF 1864 (REVENUE RECOVERY, MADRAS), 20 M. 253, 20 M. 494.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 51.

(3) See LIMITATION ACT (XV OF 1877), 21 M. 8.

(4) See MERCHANT SHIPPING ACT, AMENDMENT, 25 AND 26 VIC., C. 63, 21 M. 395.

(5) See REGISTRATION ACT (III OF 1877), 20 M. 250.

(6) See VENDOR AND PURCHASER, 21 M. 56.

**Sanction to Prosecute.**

See CRIM. PRO. CODE (ACT X OF 1882), 20 M. 8, 339, 383, 21 M. 237.

**Sanitary Inspector.** PAGE

See ACT V OF 1884 (LOCAL BOARDS, MADRAS), 21 M. 428.

**School Buildings.**

See ACT IV OF 1884 (DISTRICT MUNICIPALITIES, MADRAS), 21 M. 367.

**Set off.**

See LANDLORD AND TENANT, 21 M. 138.

**Ship.**

See MERCHANT SHIPPING ACT AMENDMENT, 25 AND 25 VIC., C. 63. 21 M. 395.

**Small Cause Court.**

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 398.
(2) See PARTNERSHIP, 21 M. 366.

**Specific Performance.**

(1) *Of contract—Sale-deed fraudulently suppressed by defendant before registration—Cause of action.*—Where the defendant agreed to sell certain land to the plaintiff and executed a sale-deed in favour of the plaintiff to that effect, but subsequently obtained possession of it before registration and fraudulently suppressed it : *Held*, that the plaintiff was entitled to enforce specific performance of the contract by the execution and registration of a fresh document. CHINNA KRISHNA REDDI v. DORASAMI REDDI, 20 M. 19 ... 13

(2) See MORTGAGE (GENERAL), 21 M. 143.

**Specific Relief Act (I of 1877).**

(1) S. 36—Injunction—Registration Act—Act III of 1877, ss. 3, 17 (*d*)—Interest in land—Timber—Lease—See REGISTRATION ACT (III OF 1877), 20 M. 58.

(2) *S. 42—Benami purchase by a Government officer prohibited from acquiring land—Suit for declaration against benamidar.*—The plaintiff sued for declaration of his title to certain land which had been purchased by him in the name of the defendant. The object of the transaction was to conceal from the Collector the fact that the plaintiff, who was a Tahsildar, had acuqired property in his taluk contrary to the rules of his department: *Held*, that the plaintiff was entitled tc the declaration sought. LOBO v. BRITO, 21 M. 231 ... 518

(3) *S. 42—Civ. Pro. Code—Act* XIV *of* 1882, *s.* 31—*Misjoinder—Tenants in common—Benami mortgage—Suit by some of the heirs of the real mortgagee Evidence of benami—Limitation—Joinder of causes of action.*—In 1880 A and B jointly advanced moneys on the security of a usufructuary mortgage which was taken in the name of B. In 1884 A alone advanced moneys on the security of usufructuary mortgages which were likewise taken in the name of B. A died leaving three sons, of whom the plaintiffs were two. The plaintiffs having become divided from their brother now brought suits in 1894 against B and the mortgagors for a declaration of their right to the mortgages and for possession of the documents and for rent of the land which had been collected by B. It appeared that there had been no denial of the plaintiffs' rights before 1889, that no rent had been collected for several years before suit, the mortgagors who had remained in possession as lessees after the execution of the mortgages having refused to attorn to B: *Held*, (1) that the suits were not barred by Specific Relief Act, s. 42, for want of a prayer for possession;

**Specific Relief Act (I of 1877)—(*Concluded*).** PAGE

(2) that the suits were not barred by limitation save as to the claim for rent ; (3) that the suits were not bad for the non-joinder of the plaintiff's brother ; (4) that the transactions having been proved to be benami in character, the plaintiffs were entitled to a declaration of their two-thirds right under the mortgages of 1884 and a like declaration as to half of the mortgage of 1880 ; and (5) that the plaintiffs were entitled to posses-sion of the mortgage documents of 1884 and the other documents connect-ed therewith, but not the others. MAHABALA BHATTA v. KUNHANNA BHATTA, 21 M. 373=8 M.L.J. 139 ... 620

(4) *S.* 42—*Suit for declaration—Laches and delay on plaintiffs' part.*—Inasmuch as in this country a period of limitation is prescribed even for suits where the grant of relief sought is within the discretion of the Court, mere lapse of time short of the period of limitation should not ordinarily be held a good ground for refusing relief to a plaintiff. ATHIKARATH NANU MENON v. ERATHANIKAT KOMU NAYAR, 21 M. 42 ... 386

(5) S. 56, cl. (*b*)—Trusts Act—Act II of 1882, ss. 91, 95—Civ. Pro. Code—Act XIV of 1882, s. 232—Decree obtained on a benami mortgage by benamidar —Suit by real mortgagee—Declaration— Injunction. See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 353.

**Stamp Act (I of 1879).**

(1) *S.* 3, *cls.* (9), (19)—*Settlement—Gift—Conveyance.*—An instrument whereby a life interest in land is created with remainder to the settlor and his heirs is a settlement within the meaning of the Stamp Act. A transfer of land, in pursuance of a compromise of a widow's suit for maintenance, is a conveyance and must be stamped accordingly. REFERENCE UNDER STAMP ACT, s. 46, 21 M. 422 ... 656

(2) *S.* 3, *cls.* (12), (13)—*Lease—Mortgage.*—An instrument, therein described as a lease, was executed in consideration of one hundred and twenty rupees, and it provided that the party paying that sum should remain in posses-sion of certain land for twelve years, but contained no provision for re-payment of that sum or for the payment of rent:—*Held*, that the instru-ment was a usufructuary mortgage and not a lease. REFERENCE UNDER STAMP ACT, s. 46, 21 M. 358 (F.B.) ... 609

(3) *S.* 46, *sch. I*, *art.* 21—*Conveyance.*—The amount payable on a convey-ance under Stamp Act, sch. I, art. 21, is properly calculated on the consideration set forth therein; and not on the intrinisc value of the property conveyed. REFERENCE UNDER STAMP ACT, s. 46, 20 M. 27 (F.B.) ... 19

**Stani.**

See MALABAR LAW (ALIENATION), 21 M. 144.

**Statute 25 and 26 Vic., Cap. 63.**

S. 3. See MERCHANT SHIPPING ACT AMENDMENT ACT, 25 AND 26 VIC., C. 63 21 M. 395.

**Stay of Proceedings.**

See CIV. PRO. CODE (ACT XIV of 1882), 20 M. 366.

**Step-in-aid of Execution.**

See LIMITATION ACT (XV OF 1877), 21 M. 400.

**Substituted Service.**

See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 324, 419.

**Succession Certificate.** PAGE

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 403.

(2) SUCCESSION CERTIFICATE ACT (VII OF 1889), 20 M. 232, 442, 21 M. 241.

**Succession Certificate Act (VII of 1889).**

(1) *Village Courts Act (Madras)—Act* I *of* 1889.—The provisions of the Succession Certificate Act apply to suits in a Village Munsif's Court. RASIBI AMMAL v. OLAGA PADAYACHI, 21 M. 115 ... 438

(2) *S.* 4—*Collection of debt on succession—Certificate of heirship—Act* XXVII *of* 1860—*Right of succeeding trustee to collect.*—In a suit brought by a widow who had succeeded her husband as trustee of an endowment for a debt due thereto :—*Held*, that she was not suing as being entitled to the effects of her deceased husband, or for payment of a debt due to the estate which had been his, but that she was suing as representing the endowment in the capacity of a trustee of its money. Accordingly, neither Act XXVII of 1860 (Collection of Debts on Succession), s. 2, nor Act VII of 1889 (the Succession Certificate Act), s. 4, was applicable to her claim, and her not having obtained a certificate of heirship to her husband's estate did not disentitle her to a decree. MALLIKARJUNA v. SRIDEVAMMA, 20 M. 162 (P.C.) = 1 C.W.N. 497 = 24 I.A. 73 = 7 Sar. P.C.J. 205 ... 114

(3) *S.* 4—*Debt due to Hindu family jointly.*—In a suit by the members of a joint Hindu family for a debt due on a document executed in favour of a deceased member of the family, the plaintiffs need not produce a certificate under the Succession Certificate Act, if they can prove that the debt was due to the family jointly : *Quære* : whether a plaintiff, in a suit to recover money by the sale of property mortgaged, need produce a certificate under the Succession Certificate Act. SUBRAMANIAN CHETTI v. RAKKU SERVAI, 20 M. 232 = 7 M.L.J. 100 ... 165

(4) *Ss.* 9, 10—*Order for issue of certificate subject to security being given—Appeal.*—On a contested application for a succession certificate under Act VII of 1889, an order was made for the issue of the certificate on security being furnished by the applicant. The opposite party preferred an appeal against the order : *Held*, that the appeal was maintainable. ARIYA PILLAI v. THANGAMMAL, 20 M. 442 ... 313

(5) *S.* 14—*Refund of deposit.*—If an application for a succession certificate is granted, the sum deposited by the applicant cannot be refunded ; but if no order for the grant of the certificate has been made, a refund can take place. SANKARA AYYAR v. NAINAR MOOPANAR, 21 M. 241 ... 526

**Suit Valuation.**

*Pecuniary limits of jurisdiction—Suit filed in superior Court.*—In a suit on a mortgage, in which the amount claimed was in excess of the pecuniary limits of the jurisdiction of a District Munsif, and which was filed in the Court of a Subordinate Judge, it appeared that there had been an adjudication by a District Munsif in a previous suit affecting the rights of the parties now in issue, and that the present claim was largely composed of interest. The Subordinate Judge having framed issues relating to the claim for interest and having tried them as preliminary issues, decided that the suit was within the pecuniary limits of the jurisdiction of a District Munsif, and that the claim had been unwarrantably exaggerated with a view to filing the suit in a superior Court, and so avoiding the plea of *res judicata*, and he thereupon

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returned the plaint to be presented in the proper Court : *Held*, that the procedure adopted was wrong and that the whole suit should have been tried. KOTI PUJARI v. MANJAYA, 21 M. 271 ... 547

**Summons.**

See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 324, 419.

**Tanjore.**

See HINDU LAW (RELIGIOUS ENDOWMENTS), 20 M. 421.

**Tax.**

See ACT IV OF 1884 (DISTRICT MUNICIPALITIES, MADRAS), 21 M. 367.

**Temple Committee.**

See ACT XX OF 1863 (RELIGIOUS ENDOWMENTS), 21 M. 179.

**Temple Manager.**

See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 21 M. 245.

**Tenants-in-Common.**

See SPECIFIC RELIEF ACT (I OF 1877), 21 M. 373.

**Timber.**

(1) See ACT I OF 1877 (MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS, MADRAS), 21 M. 411.

(2) See REGISTRATION ACT (III OF 1877), 20 M. 58.

**Title.**

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 269, 21 M. 35.
(2) See COLLUSIVE DECREE, 20 M. 326.
(3) See CONSTRUCTION, 21 M. 299.
(4) See DECREE, 21 M. 344.
(5) See EJECTMENT, 21 M. 288.
(6) See LIMITATION ACT (XV OF 1877), 21 M. 8.
(7) See MERCHANT SHIPPING ACT AMENDMENT ACT, 25 AND 26 VIC., C. 63, 21 M. 395.
(8) See SPECIFIC RELIEF ACT (I OF 1877), 21 M. 231.
(9) See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 M. 69.

**Transfer.**

(1) *Of decree—Subsequent attachment in execution against transferor.*—A transferred a decree to B who recovered part of the amount due under it and was prevented from recovering the rest by an attachment of the decree in execution proceedings against A : *Held*, that A was liable to pay compensation to B. PUTHIANDI MAMMED v. AVALIL MOIDIN, 20 M. 157 ... 110

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 388.

(3) See TRANSFER OF PROPERTY ACT (IV OF 1882), 20 M. 465.

**Transfer of Property Act (IV of 1882).**

(1) Ss. 4, 107—Lease of a shop for three years—Registration—Registration Act—Act III of 1877, s. 2 (*d*). See REGISTRATION ACT (III OF 1877), 21 M. 109.

(2) S. 53—*Transfer in fraud of creditors—Good faith.*—When it is said that a deed is not executed in good faith what is meant is that it was executed as a mere cloak, the real intention of the parties being that the ostensible grantor should retain the benefit to himself. RAMASAMIA PILLAI v. ADINARAYANA PILLAI, 20 M. 465=7 M.L.J. 246 ... 329

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(3) S. 55—Implied covenant for title—Damages for breach—Covenant implied in registered sale-deed—Civ. Pro. Code, s. 13—*Res judicata*—Limitation Act, sch. II, arts. 115. 116. See LIMITATION ACT XV OF 1877, 21 M. 8.

(4) *S.* 59—*Oral agreement for kanom—Suit for ejectment by a jenmi.*—A jenmi in Malabar sued to eject a tenant, who proved by oral evidence that he had one year before suit paid to the plaintiff a sum of money as a renewal fee and the plaintiff agreed to demise the land to him on kanom for a period of twelve years:—*Held*, that, although no instrument has been executed and registered, the plaintiff was not entitled to eject the defendant. ITTAPAN v. PARANGODAN NAYAR, 21 M. 291=8 M.L.J. 137 ... 561

(5) *Ss.* 60, 82—*Partial redemption—Contribution.*—A mortgaged two houses to B for Rs. 200. C purchased at a Court-sale A's interest in one of the houses and sold it to the plaintiff. The plaintiff sued to redeem the house and prayed that the mortgagee be ordered to convey it to her on payment of Rs 100:—*Held*, that the suit should be dismissed. KUPPUSAMI CHETTI v. PAPATHI AMMAL, 21 M. 369=8 M.L.J. 6 ... 617

(6) S. 68—Limitation Act—Act XV of 1877, sch. II, arts. 97, 116, 120—Suit for mortgage money by mortgagee on disturbance of possession. See LIMITATION ACT (XV OF 1877), 21 M, 242.

(7) *S.* 68—*Usufructuary mortgage—Possession not given—Suit for sale.*—A usufructuary mortgagee to whom the mortgagor fails to deliver or to secure possession of the property mortgaged is not entitled to claim in a suit for the money an order for the sale of such property.

*So held by the Full Bench* in a case where the mortgage contained no covenant to pay. ARUNACHALAM CHETTI v. AYYAVAYYAN. 21 M. 476 (F.B.)=8 M.L.J. 154 ... 693

(8) *Ss.* 68, 98—*Anamalous mortgage—Right to possession.*—Two out of three coparceners executed in favour of a creditor in respect of land belonging to the co-parcenary an instrument which contained the following terms:—"As we have received Rs. 500, you will, in lieu of the said amount and "interest, enjoy the said property for three years by virtue of Arakattu "otti . . . on the condition that, on the expiry of the said three "years, we should redeem the land without paying either principal or "interest. You will, on the expiry of the said period, deliver possession of "the said immoveable property without raising any objection." The creditor obtained possession of only part of the land: *Held*, that the instrument was an anomalous mortgage, and that the mortgagee was liable to ejectment after the expiry of the three years. VISVALINGA PILLAI v. PALANIAPPA CHETTI, 21 M. 1=8 M.L.J. 113 ... 357

(9) *S.* 72—*Mortgage accounts—Costs incurred by mortgagee.*—Land, having been mortgaged to the defendant, was let by him for rent to the mortgagor. The rent fell into arrear and the mortgagee sued and obtained a decree for the rent in arrear and for possession. Subsequently after the mortgagor's death, her heir, the present plaintiff, unsuccessfully resisted execution of the decree obtained against her, asserting that she had no right to mortgage the property which, it was alleged, had belonged to his father. The plaintiff now brought a suit for redemption: *Held*, that in taking the account the defendant was entitled to have credit for the costs incurred in the proceedings between him and the plaintiff, but not in the proceedings between him and the original mortgagor. POKREE SAHE BEARY v. POKREE BEARY, 21 M. 32=7 M. L. J. 238 ... 379

**Transfer of Property Act (IV of 1882)**—(*Continued*). PAGE

(10) S. 85—Civ. Pro. Code, s. 43—Ejectment suit by a mortgagor's vendee against the purchaser under a mortgage decree—Subsequent suit to redeem. See CIV. PRO. CODE (ACT XIV OF 1882), 20 M. 82.

(11) *S. 85—Mortgage suit against Hindu mortgagor and two sons—Sale of mortgage premises—Subsequent suit for share of a third son.*—A Hindu having three sons executed a mortgage in favour of the defendants, who subsequently obtained a decree for sale on the mortgage and brought the property to sale in execution and purchased it themselves, the mortgagor and two only of his sons being brought on to the record. It did not appear whether the plaintiffs in that suit were aware of the interest of the third son, who now sued to recover his one-quarter share of the mortgage premises claiming that the previous proceedings were not binding on him and alleging that the mortgage was unsupported by consideration: *Held*, that the plaintiff was entitled to have the question tried whether there was really a debt owing by the father to support the mortgage. *Quære*: Whether 17 A. 537 lays down the right rule with reference to Transfer of Property Act, s. 85. RAMASAMAYYAN v. VIRASAMI AYYAR, 21 M. 222=8 M.L.J. 126 ... 512

(12) *S. 85—Mortgagee's suit—Parties—Redemption.*—A mortgaged lands X, Y and Z to B for Rs. 5,000. Lands X and Y were sold and the proceeds applied towards the discharge of the mortgage. Land Z was sold to C for Rs. 990, which was not so applied. C transferred his rights to the present defendants. B brought a suit on the mortgage joining A and C, but not C's transferees as defendants. C did not appear, and a decree was passed by consent for Rs. 1,050, and land Z was brought to sale and purchased for Rs. 270 by the plaintiff who now sued the defendants separately for possession: *Held*, that the defendants not having been joined in the previous suit were entitled to redeem on payment of Rs. 1,050 and interest. SIVATHI ODAYAN v. RAMASUBBYYAR, 21 M. 64=8 M.L.J. 21 ... 402

(13) *S. 86—Mortgage decree—Interest—Contract rate—Subsequent interest—Civ. Pro. Code—Act* XIV *of* 1882, *s.* 209.—When a decree for sale is passed in a mortgage suit, interest at the contract rate should be decreed for the period allowed for payment by the mortgagor, and subsequent interest should be decreed at six per cent., only. SUBBARAYA RAVUTHAMINDA NAINAR v. PONNUSAMI NADAR, 21 M. 364 ... 614

(14) *S. 86—Suit by sub-mortgagee—Decree for sale.*—A sub-mortgagee is entitled to a decree for the sale of the original mortgagor's interest in cases and in circumstances which would have entitled the original mortgagee on the date of the sub-mortgage to claim such relief. MUTHU VIJIA RAGHUNATHA RAMACHANDRA VACHA MAHALI THURAI v. VENKATACHELLAM CHETTI, 20 M. 35=6 M.L.J. 235 ... 25

(15) *Ss. 88, 99—Form of decree.*—In November 1882 a decree was passed on a hypothecation bond for the payment of the secured debt and it contained the following words:—"the property hypothecated in the bond being also held liable for the whole amount thus awarded": *Held*, that the decree was in reality a decree for sale and could be executed as such. ANNA PILLAI v. THANGATHAMMAL, 20 M. 78 ... 54

(16) Ss. 91, 95—Redemption—Ejectment suit by mortgagor—Subsequent suit for redemption—Civ. Pro. Code—Act XIV of 1882, ss. 12, 13—*Res judicata*—See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 18.

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(17) S. 101—*Mortgage—Renewal of mortgage—Priority over subsequent incumbrance.*—Where a mortgagee, subsequently to the execution of the mortgage deed, takes another mortgage in renewal of the former deed, he has priority over incumbrances subsequent to the first deed. ALANGARAH CHETTI v. LAKSHMANAN CHETTI, 20 M. 274=7 M.L.T. 87 ... 195

(18) S. 119—*Exchange—Mutual covenants subsequently entered into to support title*—'Expressum facit cessare tacitum'.—The plaintiff and defendant effected an exchange of land; subsequently they executed to each other documents, of which that executed by the defendant recited the exchange and continued: "if any claim or dispute arises I hereby bind myself to "settle it. If I do not so get the dispute settled, I hereby bind myself "to pay an amount not exceeding Rs. 4,014-8-6 at the rate of Rs. 1-4-0 "per kuli of land for lands which go out of your possession." The plaintiff, alleging that he had been ousted from the land conveyed to him, now sued to recover the land which he had given in exchange:—*Held*, that the operation of Transfer of Property Act, s. 119, was excluded by the express covenant in the document quoted above. SUBRAMANIA AYYAR v. SAMINATHA AYYAR, 21 M. 69=7 M.L.T. 319 ... 405

(19) S. 127—*Onerous gift to an infant—Acceptance.*—Land was given by the defendant to the wife of the plaintiff burdened with an obligation. She accepted the gift and died in infancy leaving the plaintiff her heir. The plaintiff now sued to make good his title to the land against the donor:—*Held*, that the gift was complete as against the donor and that the plaintiff was entitled to a decree. SUBRAMANIA AYYAR v. SITHA LAKSHMI, 20 M. 147 ... 102

(20) S. 135—*Actionable claim—Claim affirmed by a Court—Consideration for assignment—Limitation—Construction of decree.*—A, as guardian of the widow and legatee of the depositor, claimed a sum of money in the hands of a Bank, to which B asserted an adverse claim. Pending an application by A for a succession certificate, B sued the Bank and the widow for the money and A was joined as a defendant. A decree was passed in 1889, by which it was ordered that the Bank should pay the money to B on his giving security to pay it over to A on his obtaining the succession certificate. B furnished security and received the money in 1892. A meanwhile had obtained the succession certificate, and in 1894 he purchased the rights of the widow who had come of age. In the same year he sued B for the money:—*Held*, that the suit was not barred by limitation and that the plaintiff was entitled to a decree; but that he could recover only the price actually paid by him with interest and the incidental expenses and costs, as the case was not within Transfer of Property Act, s. 135 (*b*) since, on the true construction of the decree of 1889, all that had been decided was who should hold the money pending the settlement of the rights of the rival claimants. SURYANARAYANA SASTRI v. RAMAMURTI PANTULU, 21 M. 253 ... 534

**Tree-pattadar.**

*Right to land on which trees stand.*—*Held*, per DAVIES and MOORE, JJ. affirming the judgment of BENSON, J., (SUBRAMANIA AYYAR, J., *diss.*) that persons holding or patta for palmyra trees in Tinnevelly are not *ipso facto* entitled to an ordinary raiyatwari patta for the land on which the trees stand. *Per* SUBRAMANIA AYYAR, J.—Land on which a man plants a palmyra tope within his exclusive occupancy and possession as a raiyat of Government, subject to his liability to pay any assessment or assessments

**Tree-pattadar**—(*Concluded*). PAGE

which the Government may from time to time be entitled to impose and subject also to all other lawful incidents attaching to a holding of that description. The rights of a tree-pattadar and the nature of the revenue levied on such pattadars considered. THEIVU PANDITHAN v. SECRETARY OF STATE FOR INDIA, 21 M. 433 (F.B.) ... 664

**Trustee.**

(1) *Of composition deed—Managing member of a firm appointed as trustee—Right of suit after dissolution of the firm.*—Certain traders having been adjudicated bankrupts in the Court of Mauritius, the creditors agreed to a composition deed which was sanctioned by the Court, whereby the present plaintiff therein described as the managing member of the firm of S. and Company was appointed trustee and his firm guaranteed the payment of a dividend of 50 per cent. The firm was subsequently dissolved and its assets were assigned to a third party. The plaintiff now sued to recover costs decreed to him in his capacity as trustee in various suits in Mauritius, and it was objected that he was precluded from suing by the dissolution of his firm and the assignment away of its assets:—*Held*, that the plaintiff was entitled to maintain the suit. SUBBARAYA PILLAI v. VAITHILINGAM, 20 M. 91 ...

(2) Suit between—Limitation Act—Act XV of 1877, s. 10—Breach of trust—Court Fees Act—Act VII of 1870, s. 5—Objection as to Court fee paid on appeal—See BREACH OF TRUST, 20 M. 398.

(3) See ACT XX OF 1863 (RELIGIOUS ENDOWMENTS), 21 M. 179.

(4) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 406.

(5) See INSOLVENCY, 20 M. 452.

(6) See LUNATIC, 21 M. 402.

**Unlawful Assembly.**

See PENAL CODE (ACT XLV OF 1860), 21 M. 249.

**Usage.**

(1) See CONTRACT, 20 M. 274.

(2) See CONTRACT ACT (IX OF 1872), 20 M. 481.

**Valuation.**

(1) See ACT VII OF 1887 (SUITS VALUATION), 20 M. 289.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 371.

**Vendor and Purchaser.**

*Want of consideration for deed of sale—Evidence that a deed is not intended to have the ordinary operation.*—The plaintiffs sued for certain land which they claimed in succession to Rathai Ammal deceased. The defendant who was in possession had executed a sale-deed comprising the property now in question, in favour of the deceased. But it was pleaded by him and found by the Court of First Appeal that the sale-deed was *benami* and no consideration had passed, and a decree was passed dismissing the suit:—*Held*, *on second appeal*, that the decree should be reversed. *Per curiam*:—When a conveyance has been duly executed and registered by a competent person, it requires strong and clear evidence to justify a Court in holding that the parties did not intend that any legal effect should be given to it. It needs to be proved that both parties had it in their minds that the deed should be a mere sham, and in order to establish this proof, it needs to be shown for what purpose other than the ostensible one the deed was executed. RANGA AYYAR v. SRINIVASA AYYANGAR, 21 M. 56... 396

**Vesting Order.** PAGE

See INSOLVENCY, 20 M. 452.

**Village Blacksmith.**

See REGULATION VI of 1831 (HEREDITARY OFFICES, MADRAS), 21 M. 134.

**Wages.**

See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 393.

**Waiver.**

See REGISTRATION ACT (III OF 1877), 20 M. 367.

**Warrant.**

(1) See ACT XIII OF 1859 (WORKMAN'S BREACH OF CONTRACT), 20 M. 457.

(2) See ACT V OF 1884 (LOCAL BOARDS, MADRAS), 21 M. 296.

(3) See CRIM. PRO. CODE (ACT X OF 1882), 20 M. 235.

**Waste.**

See MALABAR LAW (ALIENATION), 21 M. 144.

**Water-tax.**

See ACT IV OF 1884 (DISTRICT MUNICIPALITIES, MADRAS), 21 M. 367.

**Well.**

See EASEMENTS ACT (V OF 1882), 20 M. 389.

**Witness.**

See CRIM. PRO. CODE (ACT X OF 1882), 20 M. 388.

**Words and Phrases.**

(1) "As they please"—See HINDU LAW (WILL), 20 M. 293.

(2) "Being holder of a license"—See ACT I OF 1886 (ABKARI, MADRAS), 21 M. 63.

(3) "Expressum facit cessare tacitum"—See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 M. 69.

(4) "Land"—See ACT I OF 1889 (VILLAGE COURTS ACT, MADRAS), 20 M. 21.

(5) "Payable on demand"—See LIMITATION ACT (XV OF 1877), 20 M. 245.

(6) "Solemnize"—See ACT XV OF 1872 (CHRISTIAN MARRIAGE), 20 M. 12.

**Zamindar.**

(1) See ACT VIII of 1865 (RENT RECOVERY, MADRAS), 21 M. 116, 136.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 51, 236.

**Zamorin.**

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 21 M. 35, 153.

(2) See MALABAR LAW (WILL), 21 M. 105.

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